Supreme Court, U.S.
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83 No 1956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THURSTON MOTOR LINES, a corporation,

Petitioner

v.

RANDY BRADY, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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32 pp

QUESTION PRESENTED FOR REVIEW

When a plaintiff claims that he was discharged by his employer in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, and at trial the defendant shows, without contradiction, that a clearly dischargeable offense was committed and presents detailed evidence as to why the defendant reasonably and in good faith believed, and still believes, that it was the plaintiff who committed the offense, but the plaintiff denies that he did so, and the District Court credits the plaintiff's denial and thereupon rules that the plaintiff, being a black man, has been discharged in violation of the Statute - is not such ruling clearly in error as to what constitutes violation, and proof of

violation, of this Statute?

LISTING OF ALL PARTIES IN THE CASE

The plaintiffs in the case are as follows: - Randy Brady, James Williams, Michael Fox, Jerry Hunter, Francis Pendergrass, Lacy Monds, Chris Watkins, Curtiss Crawford and Lorenzo Mosely.

The defendant in the case, now Petitioner in this Court, is Thurston Motor Lines, a corporation.

TABLE OF CONTENTS

	Page No.
QUESTION PRESENTED FOR REVIEW -	1
LISTING OF ALL PARTIES IN THE CASE -	2
OPINIONS OF THE COURTS BELOW -	5
JURISDICTION OF THIS COURT -	5
STATUTORY PROVISIONS INVOLVED -	6
STATEMENT OF THE CASE -	8
REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI -	8

TABLE OF AUTHORITIES

	Page No.
Board of Trustees v. Sweeney, 429 U.S. 24, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978) -	26
Furnco Construction Corp. v. Waters, 438 U.S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978) -	26
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) -	25
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) -	26
Moore v. Sears, Roebuck & Company, 683 F.2d 1321, (11th Cir. 1982) -	24
Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977) -	26
Texas Department v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981) -	26, 30

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Western District of North Carolina has not been published in the official reports. The opinion of the United States Court of Appeals for the Fourth Circuit is published at 726 F.2d 136 (4th Cir. 1984). Both opinions are set forth in the separate Appendix which is filed with this Petition, and which is itself indexed.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals, embodying its decision and judgment, is dated January 18, 1984, and was entered on that date.

Thereafter, within apt time, the Petitioner filed with the Court of

Appeals a Petition for Rehearing and Suggestion for Rehearing en banc, which was denied on March 2, 1984. The filing of this Petition for Certiorari is within ninety days from the date of such denial of rehearing.

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the

security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."
42 U.S.C. §1981

"It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color,

religion, sex, or national origin . . ."
42 U.S.C. §2000e-2

STATEMENT OF THE CASE

The Petitioner believes that everything pertinent to a statement of the case is elsewhere set forth in this Petition, in the "Question Presented For Review" and in the "Reasons For The Granting Of A Writ Of Certiorari" - and in the interest of brevity need not be repeated at this point.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

The only aspect of this case involved in this Petition for Certiorari is the defendant's discharge of the plaintiff, James Williams, one of the defendant's black employees. The essential circumstances of Williams' discharge

can be briefly stated.

The evidence is undisputed that the defendant, a trucking company, in the implementing of company and governmental safety regulations at the Company's central terminal in Charlotte, North Carolina, routes all incoming trailer units through a "service lane" inspection, and if a trailer is found to be "hazardous to operate," a red "out-of-service" tag is wired to the handle of the trailer door.[1] If, contrary to company and governmental regulations, such tag is thereafter removed before repairs are made, the signal to maintenance and repair personnel is thereby lost, and such tag removal has the effect of channeling that trailer back

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[1]Appendix pp. 138-141, 144-146.

to the highways in its unrepaired condition.[1] The defendant presented detailed evidence that it discharged Williams, a trailer loader and unloader, for surreptitiously removing a red "out-of-service" tag from the Company's trailer "number 4171," in order to avoid the work of unloading an especially difficult "head-load" on this trailer[2] - thereby placing this trailer "in line" to move out onto the highways with a defective braking system.

The defendant further presented uncontradicted evidence that Williams was the only employee who "worked" this trailer on this occasion, and Williams acknowledged that he was "aware" that the trailer had

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[1] Appendix pp. 140-141.

[2] Appendix pp. 134, 135, 138.

a red "out-of-service" tag attached to it, but he denied that he removed the tag from the trailer.[1] It is further undisputed that the tag was found on the same day "wadded up" in a nearby trash can.[2]

The District Court at one point stated that "Williams testified that he told his supervisor about the tag."[3] In support of that statement, the District Court made no citation to anything in the record, and with all due respect, it is erroneous. There is no such testimony in the record. Williams actually testified to the contrary, namely, that he asked his supervisor to "look at" the load on a

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[1]Appendix p. 141.

[2]Appendix pp. 139, 141.

[3]Appendix p. 88.

truck trailer - and, further Williams testified, "that's all I said to him."[1]

The plaintiffs presented no evidence whatever by way of challenging or questioning the reasonableness and the good faith of the defendant in concluding that Williams had removed the out-of-service tag from the trailer.

The defendant also presented undisputed evidence that it had at various times discharged a total of twenty other employees - seventeen white and three blacks - for actions involving danger or potential danger to life or property, in the operation of its trucking business. There is no evidence that the defendant had ever failed to discharge any employee -

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[1] Joint Appendix in Court of Appeals, p. 2102.

white or black - whom it found to have been involved in actions causing situations of danger.

The majority opinion in the Court of Appeals recognized that "the removal of the tag could have" indeed "endangered lives."[1] The "specially concurring" opinion noted that although Williams testified that "he did not remove" the red tag, such denial was "without any direct or circumstantial corroboration," and that such removal if "accepted" as the act of Williams was indeed a "justifiable" cause and "reason" for "his discharge."[2]

The dissenting opinion in the Court of Appeals characterized the majority opinion

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[1]Appendix p. 20.

[2]Appendix p. 33.

in the Williams case as "clearly erroneous."[1]

> "There simply is no evidence in the record at all that Williams' discharge was motivated either by his race or by his filing discrimination charges with the EEOC . . ."[2]

> "The facts concerning the removal of the out-of-service tag from the trailer involved are without contradiction in the record. Taken most favorably to Thurston, they show that Williams removed the tag. Taken most favorably to Williams, they

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[1]Appendix p. 32.

[2]Appendix p. 31.

> show that Thurston thought, with good reason, that Williams removed the tag. Neither inference which may be drawn from these facts has anything to do with race or filing charges with the EEOC."[1]

The District Court, however, credited Williams' denial of having removed the trailer's red tag, and thereupon held that the discharge of the black employee Williams, for an offense which the Court declared he had not committed, constituted a violation by the defendant of Title VII of the Civil Rights Act of 1964,

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[1] Appendix p. 32.

42 U.S.C. §2000e-2.[2]

It is respectfully submitted that this represents an inadvertent, but fundamental, misconception of the meaning of 42 U.S.C. §2000e-2 and of the proof which must be made in order to establish violation of that Statute.

The District Court's finding that Williams did not remove the red tag does not by any means resolve, or even reach, the issue of whether the defendant discharged Williams "because of" his being a black person.

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[1]As hereinabove mentioned, the District Court also made references to Williams' having filed, with the EEOC, a charge against the defendant some two years prior to his discharge and, said the District Court, Williams' discharge was in retaliation for the filing of that charge. Yet the record may be searched from beginning to end and no testimony or evidence whatever will be found in support of that pronouncement by the District Court.

Although it was incumbent upon the plaintiffs to present proof, either direct or circumstantial, that the defendant discharged Williams because he is a black person, the plaintiffs brought forward no such evidence whatever. On the other hand, the defendant, as has been hereinabove pointed out, did present evidence refuting any suggestion or assumption that Williams was discharged because of his being black.

It is perhaps understandable that even courts now and then continue to fall into basic error on this subject. For it is undoubtedly true that the Civil Rights Act of 1964, and specifically Title VII thereof, was brought about by general and wide spread feeling that national legislation affording special protection to "minorities" was needful. Yet that

is not what became enacted. Protection was indeed afforded to minorities, but only in the sense of assuring, not special protection, but strict neutrality as between persons of different race, color, religion, sex or national origin.

Specifically, this Statute protects a white person, for example, as truly and exactly in the same sense and same degree, as it protects a black person. It directs an employer not to discriminate against any person whomsoever "because of" that person's race.[1]. But the Statute does not purport to protect

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[1]"Race, color, religion, sex, or national origin" are, of course, the correlative terms of the Statute. Since the word "race" is the word pertinent to this case, references herein will be confined to that term.

any person from unfairness or injustice, or even discrimination, at the hands of an employer - except as to discrimination which is proved to have been imposed by the employer upon a person "because of" that person's race.

As to the nature and force of the evidence which must be produced in order to establish that an employer has discriminated against a person "because of" that person's race, it is essential to recognize that such evidence, whether direct or circumstantial, must be sufficient to prove the existence of the central element mandated by the Statute in its key words - "because of." 42 U.S.C. §2000e-2. These words obviously require an ascertainment that the race of the person in question was consciously

considered by the employer in the making of adverse decision or the taking of adverse action against such person, and was an effective part in the making of such decision or the taking of such action, without which the adverse decision would not have been made or the adverse action would not have been taken.

In short, there must be evidence establishing that consideration of a person's race was the conscious motivation and purpose producing the employer's adverse decision or action against such person. Otherwise it cannot logically or sensibly be said that it was "<u>because of</u>" such person's race that the employer made the adverse decision or took the adverse action. We come then to the pivotal point of the case. What evidence has been

produced that Williams' race was considered by the defendant in deciding to discharge, or in discharging, Williams, and what evidence has been produced that Williams' race was an effective part in such decision or action? Neither the District Court nor the Court of Appeals have pointed to any such evidence whatever.

The subject of this contest is an accusation against the defendant that it violated the Statute, 42 U.S.C. §2000e-2, in discharging Williams. The defendant says that it discharged Williams because it reasonably and in good faith believed that he removed the red tag from the trailer. Williams denies that he removed the red tag, and the District Court credited his denial. But whether Williams did or did not remove the red tag <u>is not</u>

the ultimate and controlling question in the case.

The defendant's state of mind and motivation in deciding to discharge and in discharging Williams is the ultimate and controlling question in the case. On that question the defendant produced evidence as to why it reasonably and in good faith believed that Williams removed the red tage - and that this genuine and reasonable belief on its part was its sole motivation in the discharge of Williams. The plaintiffs had the burden of producing evidence to rebut and refute, if they could, the defendant's explanation of the matter. The plaintiffs came forward with no such evidence at all. Yet Williams was awarded judgment. It is submitted that in law and reason, and under the reiterated decisions of this Court and

of other courts as well, such judgment cannot stand.

The United States Courts of Appeal in the First and Eleventh Circuits, for example, have rendered decisions directly inconsistent with such a result.

> "It is well settled in employment discrimination cases such as this that for an employer to prevail, the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith <u>believed</u> plaintiff's performance to be unsatisfactory and that the asserted reason for the discharge is therefore not a mere pretext

for discrimination." (emphasis in original).

. . .

"It is not improper for a defendant to introduce evidence reflecting the unsatisfactory performance of a former employee . . . for that evidence is relevant to the real issue - the defendant's motive for termination." (emphasis supplied).

Moore v. Sears, Roebuck & Company, 683 F.2d 1321, 1323 (11th Cir. 1982)

"The reasonableness of the employer's reasons may of course be probative of whether they are pretext. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a

pretext, if indeed it is one. The jury must understand that its focus is to be on the employer's motivation, however, and not on its business judgment."

. . .

". . . [T]he ultimate question is not whether defendant's decision to fire or discipline plaintiff reflected an objective factfinder's judgment . . . but whether it was unlawfully motivated."

. . .

"McDonnell Douglas . . . is not intended to deflect the fact-finder from the central issue of whether the employer was motivated by discriminatory factors."

Loeb v. Textron, Inc., 600 F.2d 1003, 1012, ft. nt. 6, 1014, 1015 (1st Cir. 1979)

This Court in a series of cases

has likewise been at pains to define what must be proved, and by whom, in any effort to establish violation of 42 U.S.C. §2000e-2. These cases, beginning with McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) and including Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977), Furnco Construction Corp. v. Waters, 438 U.S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978), Board of Trustees v. Sweeney, 439 U.S. 24, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978), and Texas Department v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981), have laid down a structure of proof requirement which has been in no way fulfilled in the case of James Williams.

The following groups of quotations from Texas Department v. Burdine would seem to demonstrate clearly the three-step sequence of proof set forth in that decision.

> "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

> "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination."

> "Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to

the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' "

"It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."

"When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions."

"Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

"The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of

intentional discrimination."
Texas Department v. Burdine, 450 U.S. 248, 252, 253, 254, 255, 260, 67 L.Ed.2d 207, 215, 216, 217, 219, 101 S.Ct. 1089 (1981)

It could be deemed that a prima facie case for Williams was put forward when he denied, and was credited in his denial, that he removed the red tag from the trailer. But after that he presented nothing at all and left the defendant's explanation, of its good faith reasons for discharging him, unchallenged. At that point the case for James Williams, under 42 U.S.C. §2000e-2, completely failed.

The defendant respectfully submits that it is entitled to the protection of the carefully developed

rulings of this Court in this important field of law. Wherefore the defendant prays that the Court grant this Petition for Certiorari.

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(2)

83-1956

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THURSTON MOTOR LINES, a corporation,

Petitioner

v.

RANDY BRADY, et al.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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155 pp

TABLE OF CONTENTS

	Page Number
RULING ON PETITION FOR REHEARING, IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, MARCH 2, 1984	1-2
OPINION AND DECISION, IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, JANUARY 18, 1984	3-38
ORDER, IN THE UNITED STATES DISTRICT COURT, JUNE 7, 1983	39-44
SPECIAL MASTER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS, IN THE UNITED STATES DISTRICT COURT	45-50
JUDGMENT, IN THE UNITED STATES DISTRICT COURT, FEBRUARY 24, 1982	51-59
PER CURIAM OPINION, IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, JANUARY 11, 1982	60-65
ORDER ON REFERENCE TO SPECIAL MASTER, IN THE UNITED STATES DISTRICT COURT, DECEMBER 1, 1980	66-70

	Page Number
ORDER AND JUDGMENT, IN THE UNITED STATES DISTRICT COURT, DECEMBER 1, 1980	71-82
FINDINGS OF FACT AND CONCLUSIONS OF LAW, IN THE UNITED STATES DISTRICT COURT, NOVEMBER 20, 1980	83-118
MEMORANDUM OF DECISION, IN THE UNITED STATES DISTRICT COURT, JULY 16, 1979	119-126
TRANSCRIPT OF TESTIMONY OF JAMES E. WILLIAMS, IN THE UNITED STATES DISTRICT COURT, MARCH 5, 1979	127-132
TRANSCRIPT OF TESTIMONY OF OSCAR LEE FLOWE, JR., IN THE UNITED STATES DISTRICT COURT, MARCH 5, 1979	133-152

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1238

Randy Brady, et al,

Appellees,

versus

Thurston Motor Lines,
a corporation,

Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Judge Widener would grant rehearing by the panel for the reasons stated in his dissenting opinion.

Entered at the direction of Judge Butzner with the concurrence of Judge Phillips. Judge Widener dissents.

For the Court,

/s/ William K. Slate, II
Clerk

FILED

MAR 2 1984

U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1238

Randy Brady; James Williams; M. Fox; Jerry Hunter; Francis Pendergrass; Lacy Monds; Cris Watkins; Curtiss Crawford and Lorenzo Mosely,

Appellees,

-v-

Thurston Motor Lines, a corporation,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, Judge (C-C-76-343)

Argued January 10, 1983

Decided January 18, 1984

Before WIDENER and PHILLIPS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

W. T. Cranfill, Jr. (J.W. Alexander, Jr., Blakeney, Alexander & Machen on brief) for appellant; Michael A. Sheely, for appellees.

BUTZNER, Senior Circuit Judge:

This case comes to us from a remand to the district court. Brady v. Thurston Motor Lines, Inc., No. 81-1060 (4th Cir. Jan. 11 1982)(unpublished). The district court had ruled that Thurston Motor Lines, Inc., had engaged in discriminatory employment practices against black employees at its terminal in Charlotte, North Carolina, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., and the Civil Rights Act of 1866, 42 U.S.C. §1981. We remanded the case with instructions to clarify the allocation of the burden of proof in light of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which was decided after the court's entry of judgment. The district court then amended its judgment to specify the burden of proof it imposed on each of the parties.

We affirm the judgment on all issues save two. In summary, we hold: (1) the

district court properly allocated the burden of proof between the parties; (2) its findings are entitled to review under the Federal Rules of Civil Procedure 52(a); the judgment that Thurston discriminated against Randy Brady, Jerry Hunter, Michael Fox, Francis Pendergrass, and James Williams is affirmed; (4) the judgment that Thurston discriminated against Curtis Crawford is reversed; (5) lack of claimants has mooted the issue of class certification dealing with initial job placement; in all other respects the judgment pertaining to the class is affirmed; and (6) the court did not abuse its discretion in ordering injunctive relief or in awarding attorneys' fees. We deny the employees' motion to strike a portion of the appendix submitted by Thurston.

I

As a preliminary matter, Thurston raises two objections to the judgment

entered on remand. First, it argues that the district court's modification of its order neither satisfied the mandate of this court nor adhered to Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Second, Thurston urges that the findings of fact entered by the district court cannot be reviewed under the "clearly erroneous" standard of Rule 52(a) but rather are subject to the "careful scrutiny" of EEOC v. Federal Reserve Bank, 698 F.2d 633, 641 (4th Cir. 1983), cert. granted sub nom, Cooper v. Federal Reserve Bank, 52 U.S.L.W. 3330 (U.S. Oct. 31, 1983).

In response to our remand, the district court reviewed the evidence against Thurston and its notes of the trial. It then amended its judgment to reflect more clearly the method of proof it used. The district court wrote that it "did not put any burden of proof upon the defendant, but

did require the plaintiff to sustain the burden of proof as to every essential element of the claim of each plaintiff and the claims of the class (emphasis in original). It added that the "defendant has had no burden of persuasion" and that the "plaintiffs on every issue in this case have always had the burden of proof."

After the district court concluded its proceedings on remand, the Supreme Court announced its decision in U.S. Postal Service v. Aikens, 103 S.Ct. 1478 (1983). In that case, the Court noted that the ultimate factual question in an employment discrimination case is simply "'whether the defendant intentionally discriminated against the plaintiff.'" 103 S.Ct. at 1482. The plaintiff has the burden of persuading the court to believe his own explanation of the employer's motivation in making an employment decision. As in any case, however, the

plaintiff may prove his claim by direct or circumstantial evidence. 103 S.Ct. at 1481 n.3.

The district court's analysis of the evidence and its imposition of the burden of proof are consistent with the principles in Aikens and Burdine. On remand, it has complied with our mandate.

Thurston's second contention, that the district court's findings of fact are not entitled to review under Rule 52(a), is without merit. Thurston relies on our recent decision in Federal Reserve to support its argument. In that case, the district court itself actually made no findings of fact as that term is used in Rule 52(a). Rather, the district court in its original Memorandum of Decision confined itself to a "purely conclusory statement...of ultimate fact" and directed counsel for the plaintiff to submit proposed findings of subsidiary

facts. 698 F.2d at 640. We held that, where a district court's findings of fact are the result of such a "one-sided" presentation of the evidence, the findings will be subject to "careful scrutiny" on review. 698 F.2d at 640-41.

Here, in contrast, the district court demonstrated that its findings of fact were the result of an independent and impartial inquiry. First, its original Memorandum of Decision contains a detailed discussion of the individual claims made without findings proposed by plaintiffs' counsel. While the discussion of class relief was more general, the decision as a whole is far more than a purely conclusory statement of ultimate fact.

Moreover, presentation of facts to the district court was not one-sided. Unlike the procedure followed in Federal Reserve, the district court asked for proposed

findings of fact from both parties before entering its judgment. Thurston was given an opportunity to press its views upon the court by submitting extensive proposed findings of fact and conclusions of law.

In addition, the district court on remand re-examined its findings of fact and conclusions of law. It supplemented its findings with respect to the class and to each named plaintiff. In contrast to Federal Reserve, appellate review is now concerned with the record as supplemented by the proceedings on remand.

II

Thurston is a large interstate trucking firm which transports a variety of commodities. All plaintiffs worked at its terminal. They were among the more than 400 persons employed by Thurston there at any given time during the period in question--January 1, 1973, to May 31, 1977. The

terminal is a large warehouse with 80 freight doors on 3 sides of the building. Warehousemen load and unload trucks largely by hand or with the aid of dollies and fork-lifts. They are supervised by line foremen, who in turn answer to supervisors. The terminal manager is the ultimate authority at the terminal.

The terminal also employs a number of clerical workers. Among these are OS&D (overage, shortage and damage) clerks, whose job it is to locate and handle certain types of freight. Others are billing, rating, tracing, and general office clerks. Thurston employs a number of truck drivers. These include switchers, who switch cabs to trailers and back trucks into the freight doors, city drivers, and trip-rate or long-distance drivers.

Eighty-one percent (87 of 107) of all black employees hired at the terminal

between January 1, 1973, and May 31, 1977, were placed as warehousemen. This compares to 48 percent (240 of 500) of all white terminal employees hired during the same period. The evidence also disclosed that 27 percent of all warehousemen hired were black, while only 7 percent of all other terminal hires were black. There were no black supervisors at the terminal before 1974. The ratio of white to black promotions as a percentage of the white and black work forces for the 1973-76 period ranged from a high of 5.7:1 in 1974 to a low of 1.4:1 in 1973. At no time during the years in question were the proportions either equal or in favor of black employees. From 1973 to 1976, 13 white employees were transferred to clerical positions, compared with no black employees. Over the same period, 14 white employees became driver-trainees, while only 1 black employee entered the program.

There were no written job descriptions or qualifications at Thurston. Only non-supervisory, nonclerical job openings were posted at the terminal, at least until May, 1976. Employees interested in these openings made their bids orally to the supervisors. There was no written system of promotion or transfer. There was apparently only one vague criterion for promotion or transfer: "the best qualified." Who was best qualified was determined on an entirely subjective basis; there was no formal or even informal evaluation system at the terminal. The supervisor's recommendation was necessary for promotion or transfer. All persons responsible for hiring were white, and the supervisory force at the terminal was "basically all white."

There was no written system or guidelines for discipline at the terminal. The type of system used by a foreman, whether

progressive warnings or summary termination, differed from person to person. "Common sense" was the only guide to discipline. The court also found that black employees suffered proportionally more involuntary terminations than white employees as a consequence of this system. In 1976, for example, 22.8 percent of the black work force was involuntarily terminated, compared wtih 13.9 percent of the white work force. The black percentage of involuntary terminations exceeded the white proportion for three of the four years in the 1973-76 period, and the percentages were almost equal in the fourth year. Finally, the court found instances of retaliatory discharges.

When forklift assistance was required at a freight door, the warehouseman plugged in a light to notify the forklift drivers. Specifically identified white forklift drivers would repeatedly bypass black

warehousemen to aid white warehousemen even though black workers had been waiting longer. The district court credited the testimony disclosing this situation, and it found that this practice affected the production of black warehousemen by "slowing down their capability to load or unload trailers."

Several witnesses at trial testified that black warehousemen consistently received more difficult work assignments than white employees. This was accomplished in the following manner. Warehousemen were given an assignment sheet with the bills of lading when they were assigned a truck to work. It was undisputed that, by examining the bills of lading, a knowledgeable person -- such as the shift supervisor who made the assignments -- could tell what the weight of the load was and what types of packages were probably on the truck. Witnesses

testified that hand freight loads were the most difficult, for they required unloading each piece by hand -- an obviously time-consuming process. Witnesses also testified that certain loads -- J.C. Penney trucks, for example -- were always difficult because they contained a great deal of hand freight. The court credited the testimony and found that black workers were often given job assignments after the supervisor had flipped through the stack of jobs. White employees, on the other hand, were regularly assigned jobs consecutively -- that is, from the top of the stack. Although Thurston employed a complex formula to compute the time a load should take to complete, the court found that the more difficult loads often caused black warehousemen to exceed that time and thus affected their production.

The court found that six of the black employees had proved disparate treatment

because of race. It ruled in favor of Thurston on other individual claims. The court found that Thurston discriminated against black employees as a class in certain areas of employment. It mandated stage II proceedings before a special master and referred the claims of the class and the successful plaintiffs to him for further proceedings. It also granted injunctive relief and attorneys' fees.

Thurston appeals from all aspects of the court's judgment adverse to it. The unsuccessful claimants have not filed cross-appeals.

III

All of the individual plaintiffs allege disparate treatment on the basis of race. We will deal with each claim separately.

* * *

[Portions of the text of this Opinion dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

James Williams

Williams claimed that Thurston twice failed to promote him to a position as line foreman. He also claimed that his discharge was in retaliation for filing discrimination charges with the EEOC.

The court found the following facts. Williams was employed as a warehouseman by Thurston from October 1968 until January 1978. He worked frequently as a fill-in line foreman from 1969 until his discharge. He was considered qualified to be a line foreman. Williams was unable to specify the first vacancy for which he was passed over. The second vacancy was filled by white employee, Jerry Cook. Cook had previously

been employed as a dispatcher at another facility. The court referred this claim to stage II proceedings.

The court found that Williams was discharged for purportedly removing an out-of-service tag from a trailer he was assigned to unload. No one saw him remove the tag. Williams denied removing the tag and testified that he talked to the supervisor about unloading the truck with the tag. The supervisor then reassigned him to another truck. The supervisor testified that he had forgotten about the tag when he reassigned Williams and that he later found it in a wastebasket. The court held that Williams had been discharged for filing charges with the EEOC in July and October of 1976, for which he had received a right-to-sue letter in February 1977.

On appeal, Thurston has not briefed the court's decision referring Williams'

claim of failure to promote to stage II. It did reiterate the argument it made at trial that Williams's termination was reasonably justified. The truck in question that day contained a headload. Thurston argued that by taking the tag off of the trailer Williams avoided having to remove the headload, since headloads are normally left on trucks in service. Thurston offered evidence of similar discharges of employees who took action that endangered lives, as the removal of the tag could have done. Finally, Thurston urges that even if it was mistaken about Williams's culpability, it acted in good faith in terminating him because it believed that he removed the tag.

The determination of a witness's credibility is one peculiarly within the province of the trier of fact and will only be disturbed if unsupported by the record. See 9 Wright & Miller, Federal Practice and

Procedure § 2586 at 737 (1971). The court, after seeing and hearing the testimony of the witnesses, chose to believe Williams's version of the events. Its findings are not clearly erroneous.

* * *

[Portions of the text of this Opinion dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

IV

Thurston initially raises two procedural objections to the district court's order dealing with class discrimination. First, it argues that the class as certified by the district court did not meet the numerosity requirements of Federal Rule of Civil Procedure 23(a)(1). Second, it contends that the named plaintiffs are not proper representatives for the class on the isuse of initial job placements.

The district court conditionally certified the class prior to trial and then, after hearing the evidence, narrowed the class's scope. As finally defined, the class consisted of:

> Plaintiffs Hunter, Pendergrass, Fox, Williams, and Brady, all black employees currently working at the Thurston Motor Lines Terminal...or who have worked for Thurston...at any time since August 6, 1975, who have been discriminated against on account of their race in connection with initial placement in jobs, job assignments among warehousemen, the provision of forklift assistance to warehousemen, transfers by warehousemen to other positions in the terminal or to driver positions, promotion of warehousemen to supervisory or managerial positions at the terminal or to driver positions, and terminations (actual or constructive), specifically including retaliatory discharges in response to the filing of employment discrimination charges....

The court determined that there were at least 74 members in the class.

The district court's finding that, at the time of final certification, the class contained at least 74 members is not clearly

erroneous. Thurston, however, argues that the number of persons who have appeared in stage II proceedings to file claims -- twelve -- establishes a lack of class numerosity.

Rule 23(a)(1) provides that one of the requirements for a class action is that the class be "so numerous that joinder of all members is impracticable." As this court has stated: "No specified number is needed to maintain a class action." Cypress v. Newport News General & Nonsectarian Hospital Ass'n, 375 F.2d 648, 653 (4th Cir. 1967). Rather, an "application of the rules is to be considered in light of the particular circumstances of the case." 375 F.2d at 653. Thus, a "court has broad discretion in deciding whether to allow the maintenance of a class action....[G]enerally, unless abuse is shown, the trial court's decision on this issue is final." Roman v. ESB, Inc.,

requirement. See Cypress, 375 F.2d at 653 (18 members). The proper inquiry is whether an abuse of discretion has been committed in light of all the circumstances. Here, we find no such abuse.

As noted above, the district court found class-wide discrimination in initial job placement. We hold that this issue is moot. It is uncontroverted that none of the named plaintiffs -- including both those who succeeded and those who failed at trial -- claimed discriminatory initial job placement. All originally received the position for which they applied. In the second stage proceedings, no member of the class made an initial job placement claim.

The Supreme Court noted in United States Parole Commission v. Geraghty, 445 U.S. 388, 396 (1980), that the "case or controversy" language of Article III of the Constitution requires that, at any stage of

550 F.2d 1343, 1348-49 (4th Cir. 1976). See Cypress, 375 F.2d at 653.

The district court based its decision on numerosity on both the plaintiffs' and Thurston's evidence. The fact that now, several years after certification, few class members have asserted claims does not make the certification an abuse of discretion. Moreover, we are unwilling as a matter of law to hold that a class of 74 persons does not meet the requirement of numerosity. Previous cases, though uneven at best, suggest that a class as large as 74 persons is well within the range appropriate for class certification. See 7 Wright and Miller, Federal Practice & Procedure, § 1762 at 596-600 (1972 & 1982 Supp.); A. Miller, An Overview of Federal Class Actions: Past, Present, and Future 22-23 (Federal Judicial Center 1977). Indeed, this court has held that a much smaller class can meet the numerosity

litigation, a justicable case present a "live" dispute and that parties contesting the issue have a "personal stake" in the outcome. Neither of these requirements is met here.

The issue of whether the named plaintiffs are proper class representatives on the question of initial job placement can hardly be deemed live. There is not a single past or present Thurston employee who has brought a claim of discrimination in initial job placement, and the period for raising such claims at the stage II proceedings expired more than two years ago.

Nor do the plaintiffs in this case have a "personal stake" in the resolution of the initial job placement question. To avoid mootness, it is not always necessary that the named plaintiffs maintain the claim of the class they represent. After a class action is certified, the class of unnamed

persons acquires a legal status separate from that of the named plaintiffs, and the suit may proceed after the named plaintiffs' claims are no longer justicable. See Sosna v. Iowa, 419 U.S. 393, 402 (1975). But there can be no such unnamed claimants here, where no initial job discrimination claim has been made and the period for making such claims has expired. The lack of any claimants at any time establishes that the requisite adversary relationship does not exist to litigate this aspect of the class certification. See Franks v. Bowman Transportation Co., 424 U.S. 747, 755-56 (1976).

It is of no consequence that none of the parties has raised the question of mootness. Litigants cannot, by their own act or omission, invoke the jurisdiction of a federal court where there is no "case or controversy." Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 7-8 (1978).

In all other respects, we affirm the district court's findings of discrimination against the class of black employees at Thurston. The finding of discrimination in transfers and promotions is supported by the absence of written job descriptions and qualifications, the failure to post job openings, the subjective nature of personnel decisions, the "basically all white" composition of the supervisory force, the paucity of job changes among blacks, and other historical facts, including the evidence pertaining to the individual claimants. See generally Barnett v. W.T. Grant Co., 518 F.2d 543, 549-50 (4th Cir. 1975). This and other evidence, including the absence of disciplinary guidelines and the plaintiffs' evidence on discharges, supports the holding that there was discrimination in terminations. Testimony supports the findings of discrimination in provision of forklift

assistance and in job assignments among warehousemen. The district court's findings were based in part on testimony that conflicted with Thurston's. But the court, as trier of fact, was entitled to credit some evidence and to disbelieve other evidence. Thurston has not shown that the court's resolution of credibilty is clearly erroneous.

V

The court's decree enjoined Thurston's employment practices in the areas in which the court found discrimination and imposed on Thurston the duty to create nondiscriminatory working conditions at the terminal. It required Thurston to post notices of employment opportunities, to survey its black employees as to job interests, and to provide detailed job descriptions for purposes of application and evaluation. The decree required the company to make periodic

reports for two years about its implementation of the decree. The court afforded appropriate relief to the successful individual claimants. In addition, it awarded the plaintiffs $38,067.94 in attorneys' fees and expenses.

Thurston objects to both the imposition of the injunctive relief and the award of attorneys' fees. It argues that the decree is not supported by the evidence and that the fee award is an abuse of discretion.

Section 2000e-5(g) of 42 U.S.C. provides specifically for injunctive relief upon a finding of intentional discrimination in employment. We have upheld the court's findings of discrimination on the basis of race. Consequently, the decree was an appropriate exercise of the court's discretion. It must be modified, however, to delete reference to initial job placement and to

conform to our dismissal of Crawford's claims.

The court required detailed information about the claim for attorneys' fees. It followed appropriate guidelines to determine the award and reduced the amount the plaintiffs claimed. We find no abuse of discretion. Nevertheless, because of our decision pertaining to Crawford's claims and initial hiring, the district court must reconsider the award in light of Hensley v. Eckerhart, 51 U.S.L.W. 4552 (U.S. May 16, 1983). The plaintiffs, having substantially prevailed in this court, are entitled to an additional fee for services on appeal which the district court should determine on remand. They are also entitled to costs on appeal to be taxed by the clerk.

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in the opinion of the court except that part with respect to the discharge of James Williams, and as to that I respectfully dissent.

There simply is no evidence in the record at all that Williams' discharge was motivated either by his race or by his filing discrimination charges with the EEOC in July and October of 1976, for which he received a right to sue letter in February, 1977. Absent any other evidence, as is the case here, the mere fact that Williams had filed the charges in 1976 and was discharged in 1978, a year and a half later, cannot support an inference that the reason for the discharge was the filing of the charges.

The facts concerning the removal of the out of sevice tag from the trailer involved are without contradiction in the record. Taken most favorably to Thurston, they show that Williams removed the tag. Taken most favorably to Williams, they show that Thurston thought, with good reason, that Williams removed the tag. Neither inference which may be drawn from these facts has anything to do with race or filing charges with the EEOC.

It is thus my opinion that the findings of fact with respect to Williams' discharge are clearly erroneous.

PHILLIPS, Circuit Judge, specially concurring:

I concur in the result and in all of the majority opinion's painstaking factual and legal analysis. I write separately only to emphasize my basis for concurring in the affirmance of the district court's finding

that James Williams' discharge was discriminatorily motivated.

The factual issue on which that finding was based was, in my view, an exceedingly close one. As the majority opinion points out, it turned finally on credibility determinations. Williams testified -- without any direct or circumstantial corroboration -- that he did not remove the tag whose removal, or assumed removal, was the specific reason (and a justifiable one if accepted) articulated by Thurston for his discharge. Thurston's witness offered circumstantial evidence -- the tag in the wastebasket and the benefit to Williams from its removal -- to suggest that Williams had removed it or that, in any event, Thurston assumed in good faith that he had.

To find as it did on this claim, the district court had perforce to reject as pretextual -- as false -- Thurston's fall-

back assertion that whatever the fact of the matter, Thurston acted on a reasonable assumption that Williams had removed the tag, not merely that he had removed it. The finding then turned on a dual credibility determination: that Williams' testimony that he had not removed the tag was true and that Thurston's testimony about its state of mind (and possibly of the specific wastebasket episode) was false. On the underlying issue to which this conflicting testimony was addressed -- Thurston's state of mind -- the burden of persuasion was on Williams.

As the majority opinion axiomatically observes, this dual credibility determination was one "peculiarly within the province of the trier of fact". We review it, as we do all factual findings, under the clearly erroneous standard of Fed.R.Civ.P. 52(a), and under the special command of that rule to give "due regard...to the

opportunity of the trial court to judge the credibility of witnesses."

Under that standard and that special command, I agree with the majority opinion that the district court's dispositive credibility determination here -- simply accepting Williams' testimony and rejecting Thurston's -- was not clearly erroneous. I write only to say that I do not consider that our task in review of such a determination begins and ends with recognition that the trial court had an opportunity denied us to observe the conflicting witnesses' demeanors. For "[c]redibility involves more than demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence". 9 C. Wright & Miller, Federal Practice and Procedure; Civil, § 2586, pp. 736-37 (1971). This being

so, our review requires an assessment of whether a given credibility determination is made rationally suspect -- to the point of suggesting a clearly erroneous process -- by considering the evidence in its totality, or by taking judicial notice of incontestable conflicting fact, or by taking proper account of the cast of the burden of persuasion on the fact in issue.

Here, I am frank to say that, looking to the conflicting evidence alone and considering the cast of the burden of persuasion, I would be hard put as trier-of-fact to find by a preponderance of the evidence that Thurston's proffered reason for Williams' discharge was pretextual, i.e. false or "phony". But looking beyond the bald conflicting testimony on the point, there is nothing in the record which makes internally suspect to a reviewing court the process by which the trial court accepted

Williams' testimony about the historical fact and rejected Thurston's testimony about its state of mind based upon an assumption concerning that fact.

Here witness demeanor, which we cannot assess, may well have made it completely rational in light of the whole record to determine that one witness was telling the truth while the other was either consciously lying or, in the occasional way of mankind, shading the truth ever so slightly. To the extent corroboration of the one version or other is available in other evidence of record, there is only the evidence tending to corroborate Williams' version: that Thurston was engaged at the time in a general pattern or practice of discrimination of which this episode, as contended by Williams, was of a piece. Cf. Miller v. Mercy Hospital, No. 83-1323 (4th Cir., October 31, 1983)(credibility determination respecting

individual act of discrimination not supportable in light of whole record which revealed, inter alia, no general pattern of discrimination). Under these circumstances, I think we must defer to the superior "opportunity of the trial court to judge the credibility of witnesses" by observing their demeanors and otherwise exercising a feel for the case not possible in review.

By writing on this point, I do not suggest that the majority opinion implies anything to the contrary. My purpose is only to emphasize points respecting the review of credibility determinations that I believe bear emphasis from time to time, particularly in litigation contexts such as that here that frequently boil down to head-on "swearing contests" between the principal-party witnesses.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-76-343-M

RANDY BRADY, JAMES WILLIAMS; M. FOX; JERRY HUNTER; FRANCIS PENDERGRASS; LACY MONDS; and CHRIS WATKINS,	)	
Plaintiffs,	)	ORDER
-vs-	)	
THURSTON MOTOR LINES, a corporation,	)	
Defendant.	)	

On December 1, 1980, the court referred this matter to a special master, Jeffrey J. Davis, for completion of Stage II proceedings. Hearings were held before the master on January 11 and 12, and May 20, 1982. The master filed findings of fact, conclusions of law, and recommendations on January 6, 1983. On February 7, 1983, plaintiffs and defendant filed exceptions to the findings of the special master. Plaintiffs

filed a reply brief to defendant's exceptions on February 12, 1983.

After a review of the file and consideration of the arguments of counsel, this court affirms and adopts the findings of fact, conclusions of law, and recommendations of the special master with the following exceptions:

* * *

> [Portions of the text of this Order dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

(2) Defendant Thurston Motor Lines will not receive a set-off for the unemployment compensation benefits received by Curtis Crawford, Francis Pendergrass, Randy Brady, and James Williams, in the computation of their individual back pay awards. Unemployment compensation is an independent and collateral source of income, available

from the government to soften the severe difficulties brought by loss of a job. These benefits serve a separate social policy from the one served by Title VII and they are not "interim earnings or amounts earnable by reasonable diligence" that should be used to reduce the amount of back pay otherwise allowable. EEOC v. Ford Motor Co., 17 E.P.D. ¶8400 (W.D.N.C. 1977), aff'd., 645 F.2d 183 (4th Cir. 1981), vacated and remanded on other grounds, ___ U.S. ___, 102 S.Ct. 3057 (1982); Tidwell v. American Oil Co., 332 F.Supp. 424 (D.Utah 1971); Abron v. Black & Decker Mfg. Co., 439 F.Supp. 1039, 1115 (D.Md. 1977); Inda v. United Air Lines, 405 F.Supp. 426 (N.D.Cal. 1975), aff'd. in part, vacated in part, 554 F.2d 565 (9th Cir. 1977), cert. den., 434 U.S. 1007 (1978).

(3) Randy Brady and James Williams will recover back pay for the time they were unemployed following termination for cause

at companies where they were employed subsequent to their termination at Thurston Motor Lines. The uncontradicted evidence shows that while both men were fired for cause, neither one was fired for misconduct as defined in North Carolina law. Brady closed a plant when he did not have enough men to run a shift. Williams loaded freight onto the wrong truck at the direction of his supervisor. The North Carolina Employment Security Commission found both men eligible for unemployment benefits after their terminations. North Carolina law provides that misconduct on the part of an employee will prohibit the receipt of unemployment benefits. See, e.g., In re Collingsworth, 14 N.C.App. 340, 194 S.E.2d 210 (1970); Matter of Cantrell, 44 N.C.App. 718, 263 S.E.2d 1 (1980). While voluntary actions which result in the refusal or loss of employment generally end the right to back pay, honest

mistakes which lead to termination are not "voluntary" losses of employment, as implicitly recognized in the North Carolina law of unemployment compensation. Accordingly, both Brady and Williams will recover back pay for the period during which they were unemployed following their termination for cause in subsequent employment.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

* * *

> [Portions of the text of this Order dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

(6) Defendant Thurston will reinstate James Williams and pay Williams back pay from the time of his discharge until the time of his reinstatement. Back pay will be calculated in accordance with the findings of the special master with two

exceptions: (1) Defendant Thurston will not receive a credit for unemployment compensation received by Williams; and (2) Williams will be compensated for the time he was unemployed after his termination at Standard Trucking.

* * *

[Portions of the text of this Order dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

This 3 day of June, 1983.

/s/ James B. McMillan
James B. McMillan
United States Dislltrict Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
BEFORE THE SPECIAL MASTER

Civil Action No. C-C-76-343

RANDY BRADY, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THURSTON MOTOR LINES, a corporation,	)
	)
Defendant.	)

SPECIAL MASTER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

This matter was referred to me for Stage 2 proceedings by Order dated December 1, 1980. After additional discovery, notice to class members, and filing of claims, hearings were held before me on January 11 and 12, and May 20, 1982.

In accordance with the Order of Reference, the following Findings of Fact, Conclusions of Law and Recommendations are made. These Findings, Conclusions and

Recommendations are made in light of the instructions contained in the Order of Reference, and the Findings of Fact and Conclusions of Law previously entered by the District Court in this matter. In addition, these Findings and Recommendations are made also in light of the burden of proof rules imposed by the District Court in paragraph 13 of its Order and Judgment filed December 1, 1980.

* * *

[Portions of the text of these Findings dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

JAMES WILLIAMS

Findings of Fact

1. The District Court found that Mr. Williams was the victim of a retaliatory discharge, and is entitled to appropriate

relief as a result. (Findings of Fact Par. 11)

2. The District Court also found that Mr. Williams would be entitled to present a claim regarding promotion, to the Special Master for decision. (Id.)

3. In the post-hearing briefs in this matter, Mr. Williams concedes that his promotion claims are time barred. (Williams, Par. 2, 13, 14)

4. As a result, the only issue before the Special Master has to do with appropriate relief for the retaliatory discharge of Mr. Williams.

5. One of the jobs Mr. Williams held after his discharge from Thurston was at Standard Trucking. The parties stipulated that he was terminated from his job at Standard Trucking "for cause." (Vol. II, Pg. 17; Williams Brief, Par. 8)

6. From the date of his discharge through the time he was discharged at Standard Trucking, Mr. Williams was either employed, or actively seeking employment.

7. In accordance with the District Court's previous findings, and the evidence presented at the hearings before me, Mr. Williams is entitled to:

(a) Back pay from the date of his discharge, until he is reinstated, calculated as the difference between: (A) what he would have earned as a warehouseman at Thurston, and (B) what he actually earned at all of his jobs, plus any unemployment compensation during the relevant period;

(b) Interest on the back pay from the date that each

component became due until the date it is paid;

(c) Restoration of rightful seniority and full fringe benefits as if he had never been terminated;

(d) Mr. Williams' back pay should not include back pay for that period of time during which he was unemployed after he was terminated at Standard, because he was terminated for cause.

8. Mr. Williams has had the burden of proof throughout to show that he was entitled to relief, and the amount of relief to which he was entitled. He has sustained this burden.

Conclusions of Law and Recommendations

1. Mr. Williams is entitled to reinstatement and back pay in accordance with the Findings above.

2. Mr. Williams has had the burden of proof throughout to show that he was entitled to relief, and the amount of relief to which he was entitled. He has sustained this burden.

* * *

[Portions of the text of these Findings dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

Respectfully submitted,

/s/Jeffrey J. Davis
Jeffrey J. Davis
Special Master

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-76-343-M

RANDY BRADY; JAMES WILLIAMS; MICHAEL FOX; JERRY HUNTER; FRANCIS PENDERGRASS; LACY MONDS; and CHRIS WATKINS, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
and	)	JUDGMENT
CURTISS CRAWFORD and LORENZO MOSELY,	)	
Plaintiffs-Intervenors,	)	
-vs-	)	
THURSTON MOTOR LINES, a corporation,	)	
Defendant.	)	

This case is back before the court upon the January 11, 1982, remand from the Fourth Circuit Court of Appeals.

The court has again reviewed its lengthy notes taken during the trial, and has

repeated the separate analysis of each individual claim, under which several claims were found to have merit, several claims were found to have no merit, and relief for some individuals, and for the class, was ordered.

As the file will show, the court filed a memorandum of decision of the 16th day of July, 1979; findings of fact, conclusions of law, order and judgment in accord with that memorandum were drafted by the plaintiffs; and they were revised at least twice in many significant particulars by the court before final drafts were entered.

The case was tried and decided in the district court before the Burdine decision was ever rendered. The district court perhaps did not in semantic perfection "articulate" the precise litany now apparently required. However, the court did not put any burden of proof upon the defendant, but

did require the plaintiff to sustain the burden of proof as to every essential element of the claim of each plaintiff and the claims of the class.

That process has been followed in every Title VII case I have ever tried, since long before Burdine; it has required the plaintiffs to prove every element necessary to support their claims; it has put no burden upon the defendant to prove anything; it has accepted the fact that in several instances the defendant has "articulated" reasons for its actions; in some cases those reasons were found legitimate and rulings were made in favor of the defendant; in other cases, those reasons were found pretextual; and a notation was made that the plaintiffs had carried their burden of rebutting defendant's evidence.

The individual claims and the class questions were in fact decided under the

most rigorous strictures of McDonnell Douglas, as later re-stated by Burdine.

For the record, however, and in repetition of the principles previously followed in the orginal findings of fact and conclusions of law, this court reiterates:

1. The plaintiffs on every issue in this case have always had the burden of proof to satisfy the court that each plaintiff was treated in a discriminatory fashion and that the patterns and practices found to be discriminatory were such, in fact, and that the reasons, if any, advanced by defendant in explanation were pretextual.

2. The defendant had no burden of persuasion and has only been saddled with the "burden" of Burdine, which is simply to say words which, if taken at face value, explain its allegedly discriminatory actions.

3. Considering all the evidence, those plaintiffs who have won (and the class of plaintiffs on those issues where class relief was ordered) have had the burden at all times and have satisfied the burden of proving that the defendant did discriminate as alleged.

Additions to the language of specific paragraphs of the findings of fact, the conclusions of law, the order and judgment to repeat the above litany, wherever it may be appropriate, are hereafter made, and the findings of fact, conclusions of law, order and judgment are hereby amended accordingly, as follows:

ADDITIONAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW AS TO THE CLAIMS
OF THE INDIVIDUAL PLAINTIFFS AND
CLASS MEMBERS, BY NAME.

* * *

[Portions of the text of this Judgment dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

James Williams -- Paragraph 11 of the findings of fact is amended by adding the following paragraph:

Williams undertook the burden of proving that he was twice denied a foreman's job because of his race and that white employees were chosen instead. No final decision has been made by the court on this question and it is referred forward to the second stage proceedings, where claims of class members will be considered.

Williams has, however, sustained his burden of proving that he was discharged because of his complaints of racial discrimination. Plaintiff has proved that the "red

tag" excuse articulated by defendant is pretextual.

* * *

[Portions of the text of this Judgment dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

The conclusions of law are amended by striking out the first twelve lines of present paragraph 5 and inserting the following in their place:

As to every discriminatory act found, the plaintiffs have had the burden of persuasion. This burden has been upon the plaintiffs throughout; it has never been upon the defendant. Plaintiffs, through statistics and evidence of specific overt acts, have carried the burden of proving the discrimination found in the findings of fact and in the areas of discrimination listed herein. The defendant has had no burden at

any time. The defendant has had the opportunity to articulate, if it wished, and could, some legitimate non-discriminatory reasons for its challenged actions. See McDonnell Douglas v. Green, 411 U.S. 792 (1972); Trustees of Keene State College, et al. v. Sweeney, 439 U.S. 24 (1978). In every case where discriminatory action has been found, and in every case where discriminatory pattern and practice have been found to exist, the plaintiff has had the burden of proof throughout, and has fully sustained that burden, and has proved that defendant's claimed reasons were non-existent or pretextual.

As hereby amended, the findings of fact and conclusions of law originally filed on November 19, 1980, are republished and reiterated.

The order and judgment of December 1, 1980, as hereby amended, is republished and readopted as the action of this court.

This is a final judgment.

This the 22 day of February, 1982.

/s/ James B. McMillan
James B. McMillan
United States District Judge

UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1060

Randy Brady; James Williams; M. Fox; Jerry Hunter; Francis Pendergrass; Lacy Monds; Cris Watkins; Curtiss Crawford and Lorenzo Mosely,

Appellees.

versus

Thurston Motor Lines, a corporation,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued November 3, 1981

Decided January 11, 1982

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL and HALL, Circuit Judges

---

W.T. Cranfill, Jr. (J.W. Alexander, Jr., Blakeney, Alexander & Machen on brief) for Appellant; Michael A. Sheely (Joyce M. Brooks, Sheely and Brooks; Shelley Blum on brief) for Appellees.

PER CURIAM:

In this employment discrimination case, brought under Title VII, 42 U.S.C. §2000e, et seq., the district court certified a broad class and awarded individual and injunctive relief as well as attorneys' fees. On appeal, the employer has sought review of all of the adverse rulings, findings, and conclusions of the district court.

Because the district court may improperly have placed the ultimate burden of persuasion upon the employer, we vacate the judgment of the district court and remand the case for further proceedings.

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Supreme Court again considered and explained the burdens borne by plaintiffs and defendants in Title VII actions. The Court first discussed its decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under McDonnell Douglas, the plaintiff bears

the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. If the plaintiff carries this burden, the defendant must then "articulate" some legitimate, non-discriminatory reason for its action. If the defendant articulates such a reason, then the plaintiff must prove by a preponderance of the evidence that the defendant's legitimate reason was a pretext for discrimination.

In Burdine, the Court emphasized that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253. After the plaintiff establishes a prima facie case, the burden that shifts to the defendant is one of production, not of persuasion. The defendant must produce evidence that its decision was based on a legitimate, nondiscriminatory reason, but "the

defendant need not persuade the court that it was actually motivated by the proffered reasons....It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at 254-55 (citation, footnote omitted). Later, the Court again emphasized that "when the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." Id. at 260.

The Supreme Court's analysis in Burdine, is similar to this court's earlier discussion of the allocations of the burdens of proof in Title VII actions in Ambush v. Montgomery County Government Department of Finance, 620 F.2d 1048 (1980).

In discussing the individual claims, the district court generally mentioned the legitimate, nondiscriminatory reasons

offered by Thurston to explain its actions, but the court did not discuss explicitly the structure of the burdens or make clear that the plaintiff bore the ultimate burden of persuasion. In its Conclusions of Law, for example, the district court stated that the plaintiffs had proved by a preponderance of the evidence prima facie cases of racial discrimination and that Thurston had "failed to rebut said cases." It is clear, however, from the district court's own discussion that Thurston offered legitimate, nondiscriminatory reasons for its actions. It is possible that the district court found that the plaintiffs had carried their ultimate burden of persuasion and proved either that "a discriminatory reason more likely motivated the employer" or that Thurston's "proffered explanation [was] unworthy of credence," Burdine, supra, 450 U.S. at 256, but it is impossible to determine from the

district court's Findings of Fact and Conclusions of Law whether the court properly allocated the burdens and correctly assessed the evidence on a proper allocation of those burdens. Since there is no basis for a conclusion that the fact finding was not fatally defective, we vacate the judgment of the district court and remand the case for further proceedings not inconsistent with this opinion.

On remand, the district court should reconsider the individual claims according to the rules announced in Burdine, supra, and consider what effect, if any, its disposition of the individual claims might have on the remaining issues in the case.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. C-C-76-343

RANDY BRADY, JAMES WILLIAMS, MICHAEL FOX, JERRY HUNTER, FRANCIS PENDERGRASS, LACY MONDS, and CHRIS WATKINS, individually and on behalf of all others similarly situated,	)
Plaintiffs,	)
and	)
CURTISS CRAWFORD and LORENZO MOSELY,	)
Plaintiff-Intervenors,	)
vs	)
THURSTON MOTOR LINES, a corporation,	)
Defendant.	)

ORDER REFERRING CLAIMS OF
CLASS MEMBERS TO A
SPECIAL MASTER

Pursuant to the Order and Judgment dated Deccember 1, 1980 in the above captioned case, the Court enters the following

order pursuant to Rule 53 of the Federal Rules of Civil Procedure.

1. Jeffrey J. Davis is appointed as special master.

2. All claims for relief of class members made pursuant to paragraphs 3, 4, 6, and 10 of the Order and Judgment dated December 1, 1980 are referred to the special master.

3. The claims which the special master can hear are:

All black persons currently employed by Thurston Motor Lines, Inc., and all black persons formerly employed by Thurston Motor Lines, Inc., any time after August 6, 1975 at its Mecklenburg County, North Carolina terminal who have claims of racial discrimination in employment in connection with:

(a) initial placement in jobs;

(b) job assignments among warehousemen;

(c) provision of forklift assistance to warehousemen;

(d) transfer of warehousemen to other terminal positions, and driving positions;

(e) promotion of warehousemen to terminal supervisory and managerial positions, and driving positions;

(f) termination (actual and constructive), specifically including retaliatory discharges in response to the filing of employment discrimination charges with the Equal Employment Opportunity Commission. This includes class members who would have applied for the designated jobs but failed to do so because of racial discrimination.

4. In the trial of the above captioned case, the Court ruled that there was class wide racial discrimination in the areas listed above in paragraphs 3(a) through 3(f).

5. Because of the finding of class wide discrimination, the class members who file claims shall have the inferences in their favor set forth in International Brotherhood

of Teamsters v. U.S., 431 U.S. 324, 97 S.Ct. 1843, 1865-68 (1977). See also Sledge v. J.P. Stevens, 585 F.2d 625 (4th Cir. 1978). Class members who did not actually apply for jobs because of racial discrimination shall have the burden as set forth in Teamsters, supra 97 S.Ct. at pp. 1868-75.

6. The authority of the special master to grant relief includes awarding back pay, hiring, front pay, proper job placement, reinstatement, and attorneys fees, and other relief authorized by 42 U.S.C. §2000e et seq.

7. The special master has all the authority allowed by Rule 53.

8. The special master shall conduct hearings, receive evidence, and issue written findings of fact, conclusions of law, and judgments as well as resolve any conflicts in discovery.

9. The parties are to co-operate in the exchange of information.

10. The discovery rules are applicable in the manner determined by the special master.

11. Those notices deemed necessary by the special master shall be utilized.

12. The defendant Thurston Motor Lines, Inc. shall bear the expenses associated with the proceedings before the special master.

This the 1 day of December, 1980.

/s/James B. McMillan
James B. McMillan
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. C-C-76-343

RANDY BRADY, JAMES WILLIAMS, MICHAEL FOX, JERRY HUNTER, FRANCIS PENDERGRASS, LACY MONDS, and CHRIS WATKINS, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	ORDER AND
and	)	JUDGMENT
CURTISS CRAWFORD and LORENZO MOSELY,	)	
Plaintiffs-Intervenors,	)	
vs	)	
THURSTON MOTOR LINES, a corporation,	)	
Defendant.	)	

This matter having come on for trial before the Court sitting without a jury and the issues having been duly tried and Findings of Fact and Conclusions of Law having been entered on November 19, 1980, it is hereby ORDERED, ADJUDGED and DECREED:

1. The defendant, Thurston Motor Lines, Inc., and all persons in active concert or participation with it are permanently enjoined and restrained from discriminating against the plaintiffs and members of their class as described in paragraph 2 below, because of their race, in any manner which violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq, and 42 U.S.C. §1981.

2. (a) The class consists of:

Plaintiffs Hunter, Pendergrass, Fox, Williams, and Brady, all black employees currently working at the Thurston Motor Lines Terminal in Mecklenburg County, or who have worked for Thurston Motor Lines at said terminal at any time since August 6, 1975, who have been discriminated against on account of their race in connection with initial placement in jobs, job assignments among warehousemen, the

provision of fork lift assistance to warehousemen, transfers by warehousemen to other positions in the terminal or to driver positions, promotion of warehousemen to supervisory or managerial positions at the terminal or to driver positions, and terminations (actual or constructive), specifically including retaliatory discharges in response to the filing of employment discrimination charges with the Equal Employment Opportunity Commission.

(b) The defendant is to send the approved Notice of Certification, including the attachments, to each of the class members by registered mail, return receipt requested.

3. The special master (appointed by the Court) is to provide appropriate relief for the following plaintiffs. Any back pay awards are to date from the date of

discrimination, and are to include interest from said date at the rate of six percent (6%) annually. All rates of back pay are to be reduced by interim earnings, and by an amount which said persons, by ordinary diligence, should have earned. The Special Master, where appropriate, can also provide front pay, proper job placement, reinstatement, and any other proper relief:

(a) Jerry Hunter: Promotion claims to two line foreman positions, and promotion or transfer claims to two switching positions;

(b) Francis Pendergrass: Claim of retaliatory discharge;

(c) James Williams: Claim of retaliatory discharge.

(d) Randy Brady: Claims of promotion to line foreman (January, 1976), and retaliatory discharge;

(e) Curtiss Crawford: Claims of promotion or transfer to driver trainee position, and constructive discharge.

4. The following persons are entitled to present claims in second stage proceedings. Where appropriate, these claims are to be presented in the context of the prior findings of classwide discrimination set forth below in paragraph 6, infra, and in the Conclusions of Law, paragraph 5. Upon a finding of discrimination said persons are entitled to appropriate relief, including back pay as described in paragraph 3, supra.

(a) Michael Fox: Mr. Fox can recover upon a showing that a position (which did not require heavy lifting), on a permanent or temporary basis, was then available or could have been made available in the same manner it was for injured white employees;

(b) James Williams: Claims of promotion to two line foreman positions;

(c) Randy Brady: Claims of transfer or promotion to OS&D clerk position (1974) and line foreman position (late 1975);

(d) Charles Ellington: Claim of transfer or promotion to driver position.

5. The claims of Messrs. Mosely (failure to rehire), Monds (discharge), Watkins (discharge), Ellington (discharge), Tillman (discharge), Hunter (discharge), Pendergrass (discipline), Crawford (promotion to line foreman), and Fox (transfer/promotion to OS&D clerk and driver) are dismissed for failure to prove said claims.

6. The following practices of defendant Thurston Motor Lines:

(a) initial placement in jobs;

(b) job assignments among warehousemen;

(c) provision of forklift assistance to warehousemen;

(d) transfers by warehousemen to other terminal positions and driving positions;

(e) promotion of warehousemen to supervisory and managerial positions at the terminal or to driver positions;

(f) terminations (actual or constructive) specifically including retaliatory discharges in response to the filing of employment discrimination charges with the Equal Employment Opportunity Commission;

at its Mecklenburg County terminal are found to be in violation of Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e et seq) and 42 U.S.C. §1981. Blacks have been affected by said practices on a class-wide basis.

7. Defendant Thurston Motor Lines, Inc., its officers, agents, successors, servants and all persons in active concert or participation with them shall be and hereby are permanently enjoined from continuing the use of the practices described in paragraph 6 at its Mecklenburg County, North Carolina terminal.

8. Defendant Thurston Motor Lines, Inc., is specifically enjoined from using the following practices at its Mecklenburg County, North Carolina terminal:

(a) word of mouth notification of vacancies as the only method of notifying employees of vacancies;

(b) lack of written job descriptions;

(c) lack of written, objective criteria to evaluate the qualifications of an employee for a particular job;

(d) use of subjective criteria for determining who to transfer, promote or

terminate, and where to place an employee;

(e) use of current method of handing out job assignments for warehousemen (described in Finding #33);

(f) lack of written, objective criteria to measure the job performance of an employee.

* * *

[Portions of the text of this Order having no bearing on the claim at issue in this appeal have been deleted.]

* * *

10. Class members employed or formerly employed by the defendant at any time since August 6, 1975, at its terminal are entitled to present any claims they may have in connection with:

(a) initial job placement;

(b) job assignments among warehousemen;

(c) provision of forklift assistance to warehousemen;

(d) transfers by warehousemen to other terminal positions and driving positions;

(e) promotion of warehousemen to supervisory, managerial, and driving positions;

(f) employment practices of the defendant as a company, statistical evidence and individual cases of discrimination support the findings of class-wide discrimination. See the authorities cited above.

Said persons are to be sent notices of their right to present a claim, and how to present a claim. This includes class members who would have applied for the jobs listed in 10(d) and 10(e), but did not do so because of racial discrimination.

11. Defendant is to bear the expense of all required notices. Defendant is to provide plaintiffs with any needed assistance in identity of class members. The parties are to exchange any information necessary to determine the validity of any claims of class members.

12. If the parties cannot settle any back pay claims, such claims are to be decided by a special master who will be appointed by the Court, and have the powers conferred by Rule 53. Defendants are to bear the expense of any special master proceedings.

13. In any proceedings before a special master, the individual class members will have the benefit of the findings of class discrimination as allowed by International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and other appropriate decisions.

14. Copies of this judgment and the attached notices are to be posted in conspicuous places at the Mecklenburg County terminal of defendant.

15. Plaintiffs are hereby awarded costs, out of pocket expenses, and reasonable attorneys' fees.

16. Dr. Michalowski will be awarded a reasonable fee.

17. The Court shall retain jurisdiction so as to enter any further orders which may be necessary.

Dated this 1 day of December, 1980.

/s/ James B. McMillan
James B. McMillan
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. C-C-76-343

RANDY BRADY, JAMES WILLIAMS, MICHAEL FOX, JERRY HUNTER, FRANCIS PENDERGRASS, LACY MONDS, and CHRIS WATKINS, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
and	)	
CURTISS CRAWFORD and LORENZO MOSELY,	)	
Plaintiffs-Intervenors,	)	
vs	)	
THURSTON MOTOR LINES, a corporation,	)	
Defendant.	)	

Michael A. Sheely, Sheely and Brooks, 418 Law Building, Charlotte, North Carolina 28202, and Shelley Blum, Raleigh, North Carolina, for plaintiffs.

William T. Cranfill, Jr., and J. W Alexander, Blakeney, Alexander & Machen,

3450 NCNB Plaza, Charlotte, North Carolina 28280, for defendants.

Before James B. McMillan, District Judge, Western District of North Carolina, Charlotte Division.

Tried: March 5-9, 1979, March 26, 27, 1979; Non-jury.

Decided: July 16, 1979, by Memorandum of Decision on File.

This is an action brought pursuant to 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981. The complaint was filed on December 10, 1976. The Complaint, subsequent to motions by the plaintiffs and order of this Court, was amended on July 18, 1978, to allow the intervention of Curtiss Crawford and Lorenzo Mosely. Plaintiffs seek injunctive relief to remedy alleged unlawful employment practices and to provide specific relief for each individual who has suffered from these practices. Based on the evidence and the

exhibits, and after hearing and weighing the evidence, deciding on the credibility of witnesses, (and believability of their testimony), viewing the demeanor of witnesses, considering the interests of the witnesses and considering the arguments of counsel, the Court, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, makes the following:

FINDINGS OF FACT

I

JURISDICTON

1. This Court has jurisdiction pursuant to 28 U.S.C. §1343 and 42 U.S.C. §2000e-5(f).

2. The plaintiffs have complied with the procedural requirements of Title VII (42 U.S.C. §2000e et seq)[1].

II

PARTIES

3. Plaintiffs Randy Brady, James L. Williams, Michael Fox, Jerry Hunter, Francis Pendergrass, Lacy Monds, Chris Watkins, Curtiss Crawford (intervenor) and Lorenzo Mosely (intervenor), are adult black male residents of Charlotte, Mecklenburg County, North Carolina.

4. Defendant Thurston Motor Lines (the "Company" or "defendant"):

(a) is a corporation which transacts business in North Carolina;

(b) is involved in the freight business, and operates a terminal and its main office in Charlotte, North Carolina;

(c) is a person within the meaning of 42 U.S.C. §1981, and an employer within the meaning of 42 U.S.C. §2000e et seq.[2]

III

CLAIMS OF PLAINTIFFS

* * *

[Portions of the text of these Findings dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

11. Plaintiff James Williams was employed by defendant from October, 1968, until his discharge in January, 1978. He worked frequently as a fill in line foreman starting in 1969 and was considered qualified to be a permanent foreman by his supervisors. Williams was interested in the position but was passed over twice, both times for white employees. At trial plaintiff Williams was unable to specify the first foreman vacancy he was denied. As to the second vacancy, defendant's evidence was that the position was filled by Jerry Cook, a Thurston employee who was transferred to Charlotte from another facility. Cook was a dispatcher at his prior location, a

position apparently requiring some supervisory skills. It is unclear, however, whether those skills were more directly related to the work of line foreman than the ones acquired by Williams (and acknowledged by his supervisors) during his several turns as fill in line foreman. Williams should be allowed to present these claims again, in the second stage proceedings, in the context of a prior finding of classwide discrimination in promotions to supervisory positions in the terminal. See Sledge v. J.P. Stevens Co., 585 F.2d 625 (4th Cir. 1978).

In January, 1978 Williams was discharged, reportedly for removing a red tag from a trailer used by defendant to signify the need for trailer repair. No one saw Williams remove the tag. Williams testified that he told his supervisor about the tag and was given another load to work on while

the supervisor decided whether to have the tagged trailer completely unloaded. The supervisor testified that he was not reminded of the red tag earlier in the shift. Defendant suggested that Williams removed the red tag to avoid unloading freight that was hard to maneuver; it is undisputed that Williams was immediately assigned another load of freight after he finished with the tagged trailer. Williams filed a charge with the Equal Employment Opportunity Commission on July 28, 1976, and a second charge in October, 1976,[6] and Management of the Company knew of said charge since some of its members were present at Williams' depositions on February 14, 1977 and September 7, 1977. He received a "right to sue" letter in February, 1977. Williams is entitled to appropriate relief on his claim of being subjected to an unlawful (retaliatory) discharge.

* * *

[Portions of the text of this Decision dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

IV

MAINTENANCE OF CLASS ACTION

* * *

[Portions of the text of these Findings dealing with class claims having no bearing on this appeal have been deleted.]

* * *

V

CLAIMS OF CLASS MEMBERS

* * *

[Portions of the text of these Findings dealing with class claims having no bearing on this appeal have been deleted.]

* * *

[IV]*

EMPLOYMENT PROCEDURES AND PRACTICES

* Original pleading incorrectly numbered.

21. Non-supervisory, non-clerical job openings are posted. Posting covers basically only warehouseman jobs; it does not apply to driving positions. Bids are made on a verbal or written basis. Plaintiffs' witnesses consistently testified that they did not see any openings posted at the terminal.[9]

22. There are no written job descriptions.[10]

23. All persons responsible for hiring at the terminal are white.[11]

24. The seniority is "facility" seniority, which starts when the person is employed and continues during the period of employment. The principal use of seniority is shift assignment, as well as the days of the week to be worked. Seniority is not the controlling factor with respect to promotions, demotions, layoff, transfers, and other personnel actions.[12]

25(a) The defendant has a training program for drivers. It is open to both incumbent employees and new hires. There is a three week period of classroom training. This is followed by sixty hours of night driving and three months of on the road driving. The student is classified as a driver trainee.[13]

(b) In respect to the position of "driver trainees", the following number of whites and blacks have been present:

(1) Hiring: January 1, 1973 to May 31 31, 1977: 105 whites (97.2%), 3 blacks (2.8%). Plaintiffs' Trial Exhibit 2, Tables 13-17.

(2) Promotion: January 1, 1973 to May 31, 1977: 14 whites (93.3%) and 1 black (6.7%). Plaintiffs' Trial Exhibit 3, pp. 1,3,5,7,9.

26(a) The terminal has three basic types of non-management employees. These

are warehousemen, office/clerical and drivers.

(b) The warehouseman job classification has duties of loading trailers, unloading trailers, operation of forklifts and switching. The pay rate is the same for all duties.

(c) The line of authority for a warehouseman is the fill-in foreman, line foreman, warehouse foreman, operations supervisor and terminal manager.

(d) The chief city dispatcher supervises dispatchers and local drivers.

(e) The director of line haul supervises the road (trip rate) drivers.

(f) The office manager supervises the clerical workers in the rate, billing, OS & D and tracing units as well as other miscellaneous clerical employees. The office manager reports to the terminal manager.

(g) A warehousman could be promoted into local driving, over the road driving, or management.[14]

(h) A "fill-in line foreman" is a warehouseman who fills in for an absent line foreman. His pay rate remains the same. The selected individual is observed by management to see if said individual can perform adequately as a foreman.[15]

27. There is no regular evaluation of job performance. A form for such review has been obsolete for a number of years, and is utilized by the current terminal manager for the purpose of determing whether to withhold what otherwise would be an automatic pay increase.[16] There is no written policy for evaluation of job performances, nor is there any written guideline as to what criteria are to be utilized in evaluation of job performances of employees.

28. There is no written system for promotions and transfers. There are no written criteria for promotion or transfer. There are no written guidelines concerning promotion. The only written policy description concerning promotion and transfer is:

> To use our best judgment in selecting and placing each employee and to enhance his growth and worth to the company with every means possible. (Plaintiffs' Exhibit 11, p. 1, para. 3)

The primary obligation is to select "the best qualified person." Factors include attendance and work habits, prior experience and ability to adjust work schedule.[17] The recommendation of the immediate supervisor is necessary. The supervisory work force at the terminal during the period of this lawsuit was basically all white.[18] There were no black supervisors before 1974.[19] There were two blacks in supervisory positions who were terminated by Mr. Corzine.[20]

The supervisory/management workforce at the terminal is as follows:

Year	# White	% White	# Black	% Black
1970	25	100	0	0
1971	19	100	0	0
1972	19	100	0	0
1973	19	95	1	5
1974	19	95	1	5
1975	18	94	1	6

Plaintiffs' Trial Ex. 6, Charts 1-6, Terminal.

29(a) Job assignments are given to warehousemen by the shift supervisor. The job assignments are made on a shift basis. The job assignment is made on a sheet which is given to the warehouseman when he starts his shift. The sheet indicates how long it should take to unload or load a trailer. From looking at the bills of lading, one can tell to a certain extent what is on the truck.[21]

(b) The bill of lading describes the commodities on the trailer by the number of boxes, destination, weight, and a

brief description of the contents. Examination of the bill of lading(s) can reveal the difficulty of the load.[22]

(c) The trailer generally consists of hand loads (small boxes, items which cannot be moved by a forklift), hand truck loads, and forklift loads.[23]

30. Forklift assistance is provided to warehousemen. A warehouseman who needs forklift assistance plugs in a light outside the trailer. If he does not get a forklift in his area within a reasonable amount of time, he informs a shift supervisor or a foreman, and they get him a forklift as soon as possible.[24]

31. The Company has a written set of rules of conduct.[25] There is no set pattern of discipline. It varies from one supervisor to another. One supervisor utilized a system of an oral warning, then a written warning, and then termination.[26] Other supervisors

would terminate without prior warnings. The criteria was the "common sense" of the supervisor.[27] Prior to termination, some employees would receive warnings, and others would not.[28] There is no written system of discipline, and termination, nor are there any written guidelines as to what criteria to use for discipline, including termination.

[V]*

ISSUES OF CLASS DISCRIMINATION

* * *

[Portions of the text of these Findings dealing with class claims which have no bearing on this appeal have been deleted.]

* * *

36. Plaintiffs have established a prima facie case of discrimination in connection with terminations (actual and constructive), specifically including retaliatory discharge in response to the filing of employment discrimination charges

* Original pleading incorrectly numbered.

with the Equal Employment Opportunity Commission. The Company did not rebut this case. This is established by the individual cases of Messrs. Pendergrass, Williams, Crawford, and Brady, as well as statistical[29] and other evidence. Plaintiff's Trial Exhibit 34 offers numerous examples of whites receiving warnings for absenteeism prior to their termination, while Pendergrass did not receive any such warnings. The testimony of William Hunt shows that he utilized a progressive system of discipline. The testimony of Messrs. Thurston and Corzine indicated that the system was within the discretion of the supervisor, utilized "common sense" as a guideline, and was not reduced to written form. The system utilized by the terminal was essentially a group of subsystems, each one dependent upon the supervisor utilizing it. Such a system can range from the progressive system of Hunt

to the whims of another supervisor. "Common sense" as the only guide can lead to, and in this case, did lead to, uneven application of discipline, including discharge. The statistics bear this out, in that a greater proportion of the black work force was subjected to involuntary terminations.

% of Work Force Involuntarily Terminated

YEAR	% B	% W
1973	6.9	3.3
1974	14.5	6.0
1975	12.6	12.9
1976	22.8	13.9

(Plaintiff's Trial Ex. 5)

and black involuntary terminations were a much higher percentage of all black terminations than the corresponding percentage for whites:

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% of Terminations Which Were Involuntary

YEAR	% B	% W
1973	15.8	9.6
1974	43.5	26.0
1975	57.9	50.0
1976	66.7	39.1
1977	50.0	17.6

(Plaintiff's Trial Ex. 5)

A system without written guidelines, and which depends upon a subjective "common sense" as the controlling factor, is discriminatory when it results in the pattern shown by the statistics.

VI

OTHER STATISTICAL EVIDENCE

37. Other statistical evidence establishes a statistically significant difference between the black percentages of the Company's work force and the black percentages of appropriate labor markets. See Plaintiff's Trial Exhibits 9, 10, and 10A. Plaintiffs offered the credible testimony of Dr. Michalowski, an expert statistician, who testified that the percentage of blacks at the Company's terminal was statistically

significantly less than their availability in various populations and labor groups. Such evidence is persuasive. Furthermore the numbers speak for themselves. Defendant's own evidence showed the disparity between the Company's black driver work force, and outside black driver work forces to be statistically significant. Furthermore, defendant's analysis of comparing occupational groupings inside and outside the Company is not persuasive since: (i) it did not show that it only hired persons into its occupational groupings who had prior working experience in the same occupational grouping in the outside labor market; (ii) the presence of blacks among various occupational groupings is not reflective of either desire or ability; (iii) it assumes that all blacks who are qualified to be in particular occupational groupings in a particular year are or were present in said groups, and therefore

does not account for blacks who are in occupational groupings who can and should be in other groups; (iv) jobs which do not require specific skills obtained from schooling, such as truck driving, can be compared to general population and labor groups; and (v) statistics showing racial imbalance are probative of purposeful discrimination since it is ordinarily expected that non-discriminatory practices will result in a work force that is more or less representative of the community from which the work force is drawn.

VII

OTHER FINDINGS

38. Employment practices by the defendant as a company, statistical evidence, and individual cases of discrimination support the findings of discrimination set forth in paragraphs 32-36, supra.

39. Plaintiffs' attorneys have provided valuable services.

40. Dr. Michalowski is an expert in statistics, and performed valuable services.

41. Each of the findings of discrimination for Messrs. Hunter (paragraph 8), Pendergrass (paragraph 9), Fox (paragraph 10), Williams (paragraph 11), Brady (paragraph 12), and Crawford (paragraph 13) were because of their race or because they filed EEOC charges, or both.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction under 28 U.S.C. §1343(4) and 42 U.S.C. §§2000e-5(f)(1) and 2000e-5(f)(3) (§§ 706(f)(1), 706(f)(3) of the Act.

2. The defendant is an employer within the meaning of 42 U.S.C. §2000e(b) and a person within the meaning of 42 U.S.C. §1981.

3. All procedural requirements of Title VII have been met, 42 U.S.C. §2000e-5(f)(1).

4. The Court finds that a class should be certified. It consists of:

Plaintiffs Hunter, Pendergrass, Fox, Williams, and Brady, all black employees currently working at Thurston Motor Lines Terminal in Mecklenburg County or who have worked for Thurston Motor Lines at said terminal at any time since August 6, 1975 who have been discriminated against on account of their race in connection with initial placement in jobs, job assignments among warehousemen, the provision of fork-lift assistance to warehousemen, transfers by warehousemen to other positions in the terminal or to driver positions, promotion of warehousemen to supervisory or managerial positions at the terminal or to driver positions, and terminations (actual or

constructive), specifically including retaliatory discharges in response to the filing of employment discrimination charges with the Equal Employment Opportunity Commission.

5. A pattern and practice of racial discrimination can be established by the use of statistics alone, or in conjunction with evidence of specific and overt acts of discrimination. See International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and Dothard v. Rawlinson, 433 U.S. 324 (1977). Plaintiffs have established prima facie pattern and practice cases of racial discrimination in the terms and conditions of employment in the areas listed below. Once a prima facie case has been established, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason(s) for its actions. See Trustees of Keene State College v.

Sweeney, 439 U.S. 24 (1978), and McDonnell Douglas v. Green, 411 U.S. 792 (1972). The defendant has failed to rebut each such case. Each such case was established by a preponderance of the evidence.

* * *

[Portions of these Conclusions of Law dealing with issues having no bearing on this appeal have been deleted.]

* * *

(e) Terminations: This case was established in the manner set forth in paragraph 36 of the Findings. There was no uniform system of termination. There were no written guidelines as to what criteria were to be used for terminations. The system utilized was dependent upon each supervisor. In effect, there was a group of subsystems. The system to be used was within the discretion of each supervisor. Blacks were terminated without prior warnings, while whites received said warnings. Blacks were

involuntarily terminated at almost twice the rate of whites for three or four years. The governing criterion was "common sense" which is subjective. There is evidence of specific instances of adverse impact this practice had upon blacks, as well as evidence of the adverse impact upon blacks generally. Blacks who filed charges with the EEOC were terminated. Blacks, because of discriminatory job assignments, were forced to resign. This practice violates the Act. See Mitchell v. Mid Continent Spring Co., 583 F.2d 275, 17 EPD ¶8588 at p. 7020 (6th Cir. 1978); Alexander v. Aero Lodge, 565 F.2d 1364 (6th Cir. 1977); Flowers v. Crouch Walker, 552 F.2d 1277 (7th Cir. 1977); East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975); Young v Southwestern Savings and Loan Association, 509 F.2d 140 (5th Cir. 1975); Bolton v. Murray Envelope, 493 F.2d 191 (5th Cir. 1974); Jackson v. Citiy of

Akron, 411 F.Supp. 680, 11 EPD ¶10873 (N.D.Ohio (1976); and Slack v. Havens, 8 EPD ¶9491, 7 FEP 885 (S.D.Cal. 1973), aff'd in part on other grounds, 522 F.2d 1091 (9th Cir. 1975).

(f) Employment practices of the defendant as a company, statistical evidence, and individual cases of discrimination support findings of classwide discrimination. See the authorities cited above.

(g) The plaintiffs have therefore proved that the Company intentionally engaged in the unlawful practices set forth above in paragraphs 5(a)-5(e), within the meaning of §706(g) of Title VII, 42 U.S.C. §2000e et seq. See Teamsters, supra, 585 F.2d 625 (4th Cir. 1978).

(h) The Court concludes, as a matter of law, that the defendant's practices of initial placement in jobs, job assignments among warehousemen, the provision of

forklift assistance to warehousemen, transfers by warehousemen to other positions in the terminal or to driver positions, promotion of warehousemen to supervisory or managerial positions or to driver positions, and terminations (actual and constructive) are patterns and practices of racial discrimination against blacks which have violated their rights under 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981.

6. Class members shall be entitled to present claims of discrimination based upon the practices set forth in paragraph 5. Said class members shall have the presumption raised by the findings of class wide discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 357-62 (1977); and Sledge v. J. P. Stevens, 585 F.2d 625, 637-643 (4th Cir. 1978). Upon a finding of being a victim of discrimination, said class members are

entitled to be made whole. Albemarle Paper Company v. Moody, 422 U.S. 405 (1975); 42 U.S.C. §2000e-5(g). This includes, where appropriate, back pay, front pay, proper job placement, and reinstatement.

7. The following plaintiffs have proved, by a preponderance of the evidence which meeets their burden of proof, prima facie cases of racial discrimination. Defendant has failed to rebut said cases. See Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Teamsters, supra, 431 U.S. 324 (1977); and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972). Said persons are entitled to appropriate relief in second stage proceedings. Said relief, where appropriate, includes back pay, front pay, proper job placement or reinstatement. Said persons are entitled to be made whole. Albemarle Paper Company, supra, 422 U.S. 405 (1975).

(a) Jerry Hunter: Promotion claims to two line foreman positions, and promotion or transfer claims to two switching positions;

(b) Francis Pendergrass: Claim of retaliatory discharge;

(c) James Williams: Claim of retaliatory discharge;

(d) Randy Brady: Claims of promotion to line foreman (January, 1976), and retaliatory discharge;

(e) Curtiss Crawford: Claims of promotion or transfer to driver trainee position, and constructive discharge.

8. The following persons are entitled to present claims in second stage proceedings. Where appropriate, these claims are to be presented in the context of the prior findings of class wide discrimination set forth above in paragraphs 5(a)-(e). See Teamsters, supra, 431 U.S. at 357-362; and

Sledge, supra, 585 F.2d at 637-643. Upon a finding of discrimination, said persons are entitled to appropriate relief, including back pay.

(a) Michael Fox: Mr. Fox can recover upon a showing that a position (which did not require heavy lifting) on a permanent or temporary basis, was then available or could have been made available in the same manner as it was for injured white employees;

(b) James Williams: Claims of promotion to two line foreman positions;

(c) Randy Brady: Claims of transfer or promotion to OS & D clerk position (1974) and line foreman position (late 1975);

(d) Charles Ellington: Claim of transfer or promotion to driver position.

9. The claims of Messrs. Mosely (failure to rehire), Monds (discharge),

Watkins (discharge), Ellington (discharge), Tillman (discharge), Hunter (discharge), Pendergrass (discipline), Crawford (promotion to line foreman), and Fox (transfer/promotion to OS & D clerk and driver) are dismissed for failure to prove said claims.

10. The evidence amply demonstrates sustained patterns and practices of racial discrimination against blacks at the terminal of the defendant in Mecklenburg County, North Carolina. Teamsters, supra, 431 U.S. 3234 (1977). Therefore, the defendant will be permanently enjoined under §706(g) of Title VII from further discrimination against blacks and from continuing the practices set forth in paragraphs 32-36 of the Findings, and paragraph 5 above. 42 U.S.C. §2000e-5(g).

11. The Court shall appoint a special master to hear the claims set forth above

in paragraphs 6 and 8. In addition, said master will provide the appropriate relief for the persons named in paragraph 7. The special master shall have all powers conferred by F.R.C.P. 53. Defendant will bear all reasonable expense and costs, including the fee of the special master, notices, transcripts, and attorneys fees, for the second stage proceedings.

12. Plaintiffs are entitled to reasonable costs and expenses, including the fee of Dr. Michalowski and attorneys' fees.

This the 19 day of November, 1980.

s/ James B. McMillan
James B. McMillan
United States District Judge

FOOTNOTES

(1) See Plaintiffs' Trial Exhibit 32.

(2) See Plaintiff's First Set of Interrogatories, Requests for Admissions, etc. (filed 12-10-76) Requests for Admissions Numbers 27(h) and 27(i); and Defendant's Response to Plaintiffs' First Requests for Admissions, (filed 2-1-77), numbers 27(h) and 27(i).

(6) See Plaintiffs' Trial Exhibit 32 at pp. 15 and 16.

(9) Defendant's Answer to Plaintiff Revised Interrogatory 19(a)-(c)(filed March 21, 1977). Deposition of Boyce Hudspeth of June 20, 1977 at p. 63.

(10) Defendant's Answer to Plaintiff Revised Interrogatory 7(a)-(c)(filed March 21, 1977).

(11) Defendant's Answer to Plaintiff Revised Interrogatory 10(d)(filed March 21, 1977).

(12) Defendant's Answer to Plaintiff Revised Interrogatory 12 (filed March 21, 1977).

(13) Defendant's Answer to Plaintiff Revised Interrogatory 15 (filed March 21, 1977).

(14) Deposition of Boyce Hudspeth of March 20, 1977 at pp. 53-73.

(15) Deposition of Boyce Hudspeth of March 20, 1977 at pp. 55-58; Plaintiffs' Trial Exhibit 19.

(16) Defendant's Answer to Plaintiff Revised Interrogatory 8(a)(filed March 21, 1977).

(17) Plaintiffs' Trial Exhibit 19.

(18) Plaintiffs' Trial Exhibit 20; see footnote 35, infra.

(19) Testimony of Arthur Wallace.

(20) Testimony of William Hunt.

(21) Deposition of Bill Corzine at pp.22-24.

(22) Testimony of plaintiffs Crawford, Williams and Pendergrass.

(23) Testimony of plaintiffs Crawford, Williams, Pendergrass and Brady.

(24) Deposition of Bill Corzine at p. 26.

(25) Plaintiffs' Trial Exhibit 12.

(26) Testimony of William Hunt.

(27) Testimony of Messrs. Thurston and Corzine.

(28) See Plaintiffs' Trial Exhibit 34.

(36) See table on following page.

TERMINATIONS/TERMINAL

YEAR	NUMBER TERMINATED	NUMBER WHITES TERMINATED	NUMBER BLACKS TERMINATED	WHITE INVOLUNTARY TERMINATIONS (CAUSE)*	BLACK INVOLUNTARY TERMINATIONS (CAUSE)*	COMPARISON OF INVOLUNTARY RATIO[1]		COMPARISON OF INVOLUNTARY TERMINATION TO PERCENTAGE IN WORKFORCE[2]	
						% W	% B	% W	% B
1973	163	125	38	12	6	9.6	15.8	3.3	6.9
1974	100	77	23	20	13	26.0	43.5	6.7	14.5
1975	113	94	19	47	11	50.0	57.9	12.9	12.6
1976	183	156	27	61	18	39.1	66.6	13.9	22.8
1977	36	34	2	6	1	17.6	50.0		

1. Determined by dividing $\frac{\text{\# involuntary terminations for each race}}{\text{\# total terminations for each race}}$

2. Determined by dividing $\frac{\text{\# involuntary terminations for each race}}{\text{\# total in work force for each race}}$

See Plaintiffs' Trial Exhibit 5, Tables 33-37

* For reasons such as poor job performance, violation of rules, absenteeism, etc.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-76-343

RANDY BRADY, et al.,	)	
	)	
Plaintiffs,	)	MEMORANDUM
	)	OF DECISION
vs	)	
	)	
THURSTON MOTOR LINES, INC., a corporation,	)	
	)	
	)	
Defendant.	)	

Named plaintiffs brought this action in December 1976 alleging racial discrimination in employment at defendant's Charlotte, North Carolina, terminal and general offices. The suit was filed under 42 U.S.C. §2000e et seq. and 42 U.S.C. §1983 and §1981, and 28 U.S.C. §1343.

On December 29, 1977, the case was bifurcated for trial and a class was conditionally certified. The class was defined to include all named plaintiffs except intervenor Crawford and all black employees currently working at Thurston Motor Lines,

Inc., in Mecklenburg County or who have worked for defendant at any time since August 6, 1975, or who may have applied for employment with defendant since August 6, 1975, and were not hired. Plaintiffs alleged discrimination by defendant on the basis of race in connection with hiring, promotions, job assignments, job classification, discipline, training, and discharge.

The issues of liability and entitlement to declaratory and injunctive relief were tried to the court in March, 1979. The parties have submitted post-trial memoranda on the question of class relief. The court has reviewed the record and concludes as follows:

* * *

[Portions of the text of this Decision dealing with class claims which have no bearing on this appeal have been deleted.]

* * *

4. Plaintiffs have demonstrated a pattern and practice of racial discrimination in the terms and conditions of employment at defendant's Mecklenburg County terminal facility in the areas of initial placement in jobs, job assignments among warehousemen, the provision of fork lift assistance to warehousemen, transfers by warehousemen to other positions in the terminal or to driver positions, promotion of warehousemen to supervisory or managerial positions at the terminal or to driver positions, and terminations (actual and constructive), specifically including retaliatory discharges in response to the filing of employment discrimination charges with the Equal Employment Opportunity

Commission. Individual class members shall be entitled to present such claims in second stage proceedings.

INDIVIDUAL CLAIMS

* * *

[Portions of the text of this Memorandum of Decision dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

Class member James Williams was employed by defendant from October 1968 until his discharge in January 1978. He worked frequently as a fill in line foreman starting in 1969 and was considered qualified to be a permanent foreman by his supervisors. Williams was interested in the position but was passed over twice, both times for white employees. At trial plaintiff was unable to specify the first foreman vacancy he was denied. As to the second vacancy, defendant's evidence was that the position was

filled by Jerry Cook, a Thurston employee who was transferred to Charlotte from another facility. Cook was a dispatcher in his prior location, a position apparently requiring some supervisory skills. It is unclear, however, whether those skills were more directly related to work of line foreman than the ones acquired by Williams (and acknowledged by his supervisors) during his several turns as fill in line foreman. Williams should be allowed to present these claims again, in the second stage proceedings in the context of a prior finding of classwide discrimination in promotions to supervisory positions in the terminal. See Sledge, supra. In January 1978 Williams was discharged, reportedly for removing a red tag from a trailer used by defendant to signify the need for trailer repair. No one saw Williams remove the tag. Williams testified that he told his supervisors about the

tag and was given another load to work on while the supervisor decided whether to have the tagged trailer completely unloaded. The supervisor testified that he was not reminded of the red tag until after he had given Williams another load and recalled having seen the tag earlier in the shift. Defendant suggested that Williams removed the tag to avoid unloading freight that was hard to maneuver; it is undisputed that Williams was immediately assigned another load of freight after he finished with the tagged trailer. Williams filed a charge against defendant with the Equal Employment Opportunity Commission in July, 1976, and filed a second charge in October 1976. He received a "right to sue" letter in February, 1977. Williams is entitled to appropriate relief on his claim of being subjected to an unlawful (retaliatory) discharge.

* * *

[Portions of the text of this Memorandum of Decision dealing with named plaintiffs whose claims have no bearing on this appeal have been deleted.]

* * *

Plaintiffs are directed to file proposed findings of fact (as necessary to supplement the findings set out in this memorandum), conclusions of law, and an appropriate order or orders, in conformity with the foregoing, by August 6, 1979. If counsel believes that reference to a special master is appropriate, he shall submit an appropriate order of reference. Findings of fact, as supplemented, should not exceed one-half page for each claim of every individual who is discussed in this memorandum, and should not exceed two pages for class issues. Conclusions of law should not exceed three pages in their entirety. Pages should

be double-spaced; standard sized type shall be used.

Defendant shall submit its objections or counterproposals, if any, under the same length restrictions, by August 27, 1979.

This the 16 day of July, 1979.

s/ James B. McMillan
James B. McMillan
United States District Judge

TRANSCRIPT OF TESTIMONY
UNITED STATES DISTRICT COURT
JAMES E. WILLIAMS
MARCH 5, 1979

Direct Examination

By Mr. Sheely:

Q What happened on January 7, 1978?

A On January 7, 1978, I went to work, which was on a Saturday morning. I was given a load of freight to work, and on the front of this cover it said I had a head load. Now a head load means that this particular shipment would have stayed on that trailer. I went to my trailer. When I got to the trailer, it had a red tag on it.

Q What does that mean?

A There was something wrong with the trailer and, in this case, if it was serious enough, the head load would have to come off the trailer.

Q When you say there was something wrong with the trailer, what do you mean?

A Well...

Q You mean with the load on the trailer?

A The trailer itself. In this case it needed brakes. The red tag was at the bottom of the door, fastened to the bottom of the door. When I raised the door, it sent the tag to the top of the door. I worked my freight down until I got to the head load and, incidentally, this trailer was parked directly across from the shack. When I got to the head load, I went to the shack and told my supervisor, which was Lee Flowe, I said, Lee, I wish you would take a look at this load. That's all I said to him. He came out of the shack, came over, looked at the load. The load was going to Columbia. He walked down to the Columbia trailer and asked the fellow how much freight he had on his trailer. The fellow said I have three pieces on here. He said take it off.

We're going to use James' trailer for a head load. He gave me another truck, and 45 minutes later he called me to the shack and told me, said I called Boyce at home and he said to fire you, said you took this red tag off to keep from working that load, and I said I didn't take a red tag off the trailer. He said you're a liar. You did. He had the tag in his hand. If I had taken the tag off the trailer, I would have torn it up. He said you're a liar, hit that clock. So I left.

Q What kind, was it a door that went...

A Yes, you know, the door pulls up. Now, as I said, with the head load already on the trailer, there would have been no need to ask him about it at all. I would have left the head load on there. Since it had the red tag on there, I went and told him to come look at it. I got fired

for removing a red tag, which I didn't do, which was naturally a frame-up.

Q Did you file a charge with the EEOC?

A Yes, I did.

. . .

COURT: . . .What he said is that he went to the trailer. Let me ask a question. Did you see the red tag when you got there?

A Oh, yes.

COURT: Was anything wrong with, were you unloading or loading the trailer?

A I was supposed to have been unloading.

COURT: There was nothing wrong with unloading the trailer with the red tag on it.

A Oh, no, sir. In other words....

COURT: All right, now, you got to the head load.

A Right.

COURT: Is that the load that was at the front end of the trailer?

A That's right. That is the load that is supposed to stay on.

COURT: You weren't supposed to remove that.

A No.

COURT: How did you know you were not supposed to remove it, because it was marked that way on the...

A It was marked head load.

COURT: Okay. Now, why then did you call Flowe?

A Because with the red tag and something wrong with the trailer, then the head load would have to come off.

COURT: Maybe that's the thing I didn't understand. In other words, you called him because, although you had been told to stop when you got to the head load,

you realized that the head load also should come off?

A That's right.

TRANSCRIPT OF TESTIMONY
UNITED STATES DISTRICT COURT
OSCAR LEE FLOWE, JR.
MARCH 5, 1979

Direct Examination

By Mr. Cranfill:

MR. CRANFILL: Judge, perhaps we could follow the same procedure in putting in these exhibits that we did the other day with Mr. Corzine. The exhibits that I am first concerned with Mr. Flowe concern plaintiff Williams and his discharge and they are Numbers 28 through 33.

COURT: These are defendant's Exhibits 28 through 33?

MR. CRANFILL: Yes, sir. Judge, if you would, turn to Number 32, which is a copy of the pertinent parts of the Department of Transportation's regulations and look first on the first page of Exhibit 32, Section 396.4, unsafe operations forbidden. That's the first sub-section that is pertinent to this discharge. Then

on the second page, the sub-section is 396.5(c), (c-2), (c-3), and (c-4), essentially the left hand column on the second page of Exhibit 32. I'm principally concerned with sub-part 3 in the center of that column reading, no person shall remove the out-of-service sticker from any motor vehicle prior to completion of all repairs required by the out-of-service notice on form and a form number. Our position on Mr. Williams is that he was loading Trailer 4171 on the 7th of January, 1978, and that he took an out-of-service sticker from the back of that trailer in order to avoid having to move about three thousand pounds of freight that was on that particular trailer at the time. And that Mr. Flowe found the sticker in the trash can thereby learning what Mr. Williams had done and the reason that this particular trailer was out of

service was that the brakes needed to be relined. Defendant's Exhibit 28 is the termination notice on Mr. Williams and it summarizes the reason for that action. 29 is a reprimand; this is another summary of what Williams did. 30 is a copy of the out-of-service notice.

COURT: What is a rough head load?

Q Mr. Flowe?

A A rough head load would be freight that might be a little difficult to move, maybe some long freight. I believe that's what it was.

COURT: All right. Go ahead.

Q Mr. Flowe, what is your full name?

A Oscar Lee Flowe, Jr.

Q By whom are you presently employed?

A Thurston Motor Lines.

Q How long have you been employed by Thurston?

A May 11, 1963.

Q What is your present position with the company?

A Warehouse supervisor.

Q How long have you occupied that position?

A I believe -- I don't remember the exact date -- I believe in '71, late '71. I became supervisor when Mr. Dyer took another job in the warehouse. I was a line foreman prior to that.

Q What shift are you supervisor of?

A The first shift; my shift is Tuesday through Saturday.

Q And in January of 1978, were you also first shift supervisor?

A Yes, sir.

Q Was Mr. Williams one of the warehousemen working on your shift at that time?

A Yes, sir.

Q There came a time when you discharged Mr. Williams. Would you relate to the Court what led up to that discharge?

A I would like to go back to starting the shift. I go around the shift each day to relieve the third shift man. I make notes as to out-of-service tags and head load and so forth.

Q Let me interrupt you there.

MR. CRANFILL: Judge, we're looking now at Exhibit 31.

Q Mr. Flowe, this is defendant's Exhibit 31; is this a copy of the notice you're talking about?

A That's correct.

Q Do you make these notations every day?

A That's right, each day.

Q And is this exhibit a copy of the notes that you made on this particular day, that being January 7, 1978?

A That's correct.

Q What did you mean by this third line down?

A 18 was a red tag and I also put the trailer number down, Trailer 4171.

Q When did you do this or make these notations in relationship to the start of the shift?

A Well, I usually come in about 7:00, approximately an hour before shift time and, as I relieve the third shift foreman, I make those notes.

Q Did you make these particular notes at that time?

A Yes, I did.

Q Was this before or after Mr. Williams came to work and started doing this load?

A This was before he came to work.

Q All right, continue on. You made the notes.

A Right, and Mr. Williams worked the trailer and I believe, as well as I remember, he finished approximately at 9:30 or 10:00 and he came up stating that he had a head load on it. At the time I had forgotten that I had a tag on it. I

handed him another load and as he went to start his other load, I realized that the door was down and the trailer tag was missing. This particular trailer was sitting in Door 18, which is directly, from the office you can look right out the window and see the trailer. Then I went out and looked for the tag and I found it wadded up in the trash can right beside the trailer.

Q Let me stop you there. Is this the tag that you found in the trash can?

A That's right.

Q And where had that tag been that morning when you were making the rounds?

A It was on the door, the back door of the trailer.

MR. CRANFILL: Judge, if you would like to see the original of the tag, the copy is not particularly plain, that's the tag.

Q Continue on; you found this tag in the trash can.

A In the trash can.

COURT: What are these words on here?

A I believe it says brakes need relining, I believe.

COURT: In the floor bag?

A Sometimes there would be several things on there.

COURT: Can you read it?

A That's correct; brakes need relining and floor bad. I'd also like to say on these trailers, as they come into our terminal, they go through a service lane. They are serviced immediately when they arrive and there's no service check on the trailers after one time they are through the lane. We unload them, load them back and they are ready to go out. There's not a further check as far as service.

Q Would the procedure have been for this tag to have been put on the trailer at the time it went through the service lane?

A Right.

Q There would have been no subsequent checking of that trailer if it had gone out the gate once that tag had been removed.

A That's correct.

Q You found the red tag, then what did you do?

A I called Mr. Williams back to the warehouse office and I questioned him on it. Of course, he denied it, but no one else had an opportunity to pull that tag because it only happened in a matter of minutes. The trailer being in the position it was in, I could see it from, readily from where I was in the office. I didn't go out of the office except to check for the tag. Therefore, I terminated him on those grounds.

Q Was anybody else working that trailer?

A No, sir.

MR. CRANFILL: By way of explanation, Judge, on the remainder of these, the remaining Exhibit 33, this is a three-part exhibit and its purpose is simply to show Mr. Williams was working Trailer 4171 at that time. The first page is the break load report. You have had testimony about the function of that paper before. The second page, third name down, J. Williams, immediately to the right of his name, 4171, that's his trailer.

COURT: What are those entries; can you read the words that appear on there?

MR. CRANFILL: On the second page?

COURT: Yes. Williams, 4171, what is the word in the next column?

MR. CRANFILL: I'll have to ask Mr. Flowe.

Q Right here.

A That's...

COURT: Read the words to me so I'll know what it says. It says Williams...

A The number, that's from the Roanoke terminal.

COURT: That says Roanoke?

A Right. The time it arrived.

COURT: That's 87 and 228.

A Right.

COURT: What does 18 mean?

A That's the particular door that trailer was in.

COURT: What is the six?

A Number of bills.

COURT: What is the next thing?

A The amount of weight on that particular trailer.

COURT: And what's the next thing?

A The time started, the time finished.

COURT: Eight o'clock to ten o'clock?

A Right. The time it took him to work it. It should have taken an hour and seven-tenths; it took him two hours to complete the trailer.

. . .

Cross Examination

By Mr. Sheely:

Q In reference to Mr. Williams, as I understand your testimony, you saw the tag around seven, between seven o'clock and seven-thirty?

A Yes, sir, that's correct.

Q And at that time, was the door down or up?

A The door remains down until the man starts to work the trailer. The door would come up when he began the trailer, approximately eight o'clock.

Q If the door is down, does that mean the trailer has not been worked at all?

A That's right, and the seal has not been broken.

Q And you gave the truck to Mr. Williams about eight AM to unload.

A That's correct.

Q As I understand that particular Exhibit 30, there was about fifteen thousand pounds or so on the truck.

A That's correct.

Q Did you look at the trailer between the time you gave it to Mr. Williams and until the time he came up to you and told you he had finished around ten o'clock?

A Yes, sir, I did.

Q During that time?

A Yes, sir.

Q And was he in the back working it?

A Yes, sir.

Q And as I understand, you went back and found the tag in the trash can after he had come back to you and told you he had finished it.

A That's correct.

Q And you didn't see him take the tag.

A No, sir, I did not.

COURT: What do you mean when the door is down? Does the door on that trailer open overhead like an overhead garage door or out to the side?

A Most of them open up like a garage door. We do have a few that open in the other direction but this particular trailer opens that way.

COURT: What kind of freight do you haul in that trailer?

A We can haul most any kind of freight, sir, anything from an automobile to a piece of steel.

COURT: It's a corrugated or segmented door that will bend as it goes up and over.

A Yes, sir.

COURT: Where is the tag; where is it supposed to be?

A It's attached to the handle of the door where it's readily visible for anybody that might open that door.

COURT: All right, go ahead.

Q Were people moving in that area of the warehouse in that period of time, between eight and ten o'clock?

A I'm sure there were people moving, yes. I work thirty to thirty-five men.

Q Between eight o'clock and ten o'clock, to make sure I understand, you weren't watching the trailer all that time, were you?

A No, sir. That would be impossible working that many men.

. . .

Redirect Examination

By Mr. Cranfill:

. . .

Q Does a warehouseman normally open the door of his trailer?

A Yes, sir.

Q In looking to this particular load Mr. Williams was working on that day, it says here on the termination notice there was a rough head load to Savannah. What do you mean by that and what was going on as to the head load and can you testify about that?

A Well, a rough head load would probably be...

COURT: Do you have any recollection as to what those words meant when you put them there?

A The rough head load?

COURT: Do you have any memory what the head load consisted of?

A No, sir, I really couldn't say.

COURT: Okay, objection sustained.

Q Was there any advantage to Mr. Williams if he could get that red tag off the trailer?

A Well, the only advantage, he could get out of his load quicker and save a little work on his part. That's the only reason I could figure why he pulled that tag.

Q That is, he would not have had to unload that head load.

A Not necessarily. Brakes can be fixed still loaded. The floor is a questionable thing, whether the hole is behind or beyond the head load.

Q Was that a designated head load when the trailer came into the terminal?

A No, sir, it was not.

Q Do you have a procedure whereby you can designate freight as a head load?

A Yes, we do. The code clerks designate that on the cover sheet, if it's obvious it's a head load.

Q Can a warehouseman working with you cause freight to become a head load once it gets to the terminal?

A Yes, sir.

Q And what is normally done in order to get that accomplished?

A Well, he comes to me and asks if he can leave that particular freight on the trailer. We try not to handle any more freight than we have to. His instructions are to come to me if he comes up with a nose load or head load.

Q Is that what happened on this day with respect to Mr. Williams?

A That's correct.

Q If the red tag had not been removed, would all the freight on that trailer have had to come off?

A No, sir.

Q Would Mr. Williams have had to work the whole load if he had not taken the tag off?

A Well, there's a possibility that he would have. Like I say, it's according to where

the floor was bad in that particular trailer.

MR. CRANFILL: That's all I have.

MR. SHEELY: I just have a couple of questions.

Recross Examination

By Mr. Sheely:

Q After a person gets done with the first truck they are assigned in the morning on the shift, they would come back to you to get a second assignment.

A That's correct.

Q And the second assignment would consist of the same thing as the first assignment he had, either loading or unloading a truck.

A That's correct.

Q If Mr. Williams' advantage was to avoid that load, didn't he lose the advantage by coming back to you and getting another assignment to unload or load a trailer?

A I believe the record shows that he had gone over his allotted time already and it would have taken him quite a bit more time to have unloaded completely.

Q But his next assignment would have been the same, either loading or unloading a truck.

A That's correct.

MR. SHEELY: I don't have any other questions.

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No. 83-1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THURSTON MOTOR LINES, a corporation,

Petitioner,

vs.

RANDY BRADY, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS BRADY, ET AL. IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF AUTHORITIES	iii
REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE	1
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	1
A. Actions Of The District Court.	1
B. Opinion Of The Court Of Appeals On The First Appeal	3
C. Actions Of The District Court After The Remand	3
D. Opinion Of The Court Of Appeals On The Second Appeal	4
E. Evidence Concerning The Retaliatory Discharge Of James Williams	6
(i) Brady	7
(ii) Pendergrass	8
(iii) Williams	10
(iv) Termination System	12
SUMMARY OF ARGUMENT	14

TABLE OF CONTENTS CONTINUED

	PAGE(S)
ARGUMENT	15
A. The Court Of Appeals And District Court Properly Applied Well-Established Principles Of Law To The Facts	15
B. There Is No Intercircuit Conflict	34
CONCLUSION	37
APPENDIX	App. 1

TABLE OF AUTHORITIES

	PAGE(S)
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	29
Castaneda v. Partida, 430 U.S. 482 (1977)	13
DeMarco v. United States, 415 U.S. 449 (1974)	30
Guzman v. Pichiril, 369 U.S. 698 (1962)	30
Hazlewood School District v. United States, 430 U.S. 299 (1977)	13
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	20,21, 26,29, 30
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	21,24, 25,26, 33
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	3,22, 29
U. S. Postal Service v. Aikens, ___ U.S. ___, 103 S.Ct. 1478 (1983)	5
OTHER CASES	
E.E.O.C. v. American National Bank, 652 F.2d 1176 (4th Cir. 1981), cert. den. 103 S.Ct. 235 (1982)	13

TABLE OF AUTHORITIES CONTINUED

	PAGE(S)
Lilly v. Harris-Teeter, 720 F.2d 326 (4th Cir. 1983), 104 S.Ct. 2154 (1984)	13
Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979)	34
Moore v. Sears, Roebuck and Company, 683 F.2d 1321 (11th Cir. 1981)	34,35
TREATSIES	
Wright and Miller, Federal Practice and Procedure: Civil (West Publishing, 1971)	31
STATUTES	
42 U.S.C. § 1981	2
42 U.S.C. § 2000e et seq.	1,2

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

INTRODUCTION

A Writ of Certiorari should not be granted in this case because: (a) The District Court and the Court of Appeals correctly applied well-established principles of law to the facts of the case; (b) There is no intercircuit conflict as asserted by the Petitioner; (c) The Petitioner has failed to advance a single valid reason for the granting of a Writ; (d) The Petition is a misstatement of the actions of the District and Appellate Courts; and (e) The Petition fails to describe all of the relevant evidence.

COUNTERSTATEMENT OF THE CASE

A. Actions Of The District Court.

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et

seq.,[1] and 42 U.S.C. § 1981. The respondents, black former employees of Petitioner, alleged that Petitioner engaged in racial discrimination in various aspects of its employment policies and practices. After conditionally certifiying a class, the District Court redefined the class at the conclusion of the trial (22).[2] The District Court found and concluded that some plaintiffs were entitled to relief: e.g., Brady, Pendergrass and Williams (retaliatory discharges) (74-75). Various claims were dismissed for failure of proof (76).

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[1] Hereinafter referred to as the Act.

[2] All undesignated numbers enclosed by parentheses refer to pages in the Appendix which accompanied Petitioner's Petition. Numbers designated as "Appendix at page ____" refer to the Appendix attached to the end of this Brief. This Appendix is necessary since the petitioner deleted relevant portions of the District Court's Findings from its Appendix.

Class discrimination was found in various practices, including termination (76-77). Injunctive relief was ordered (78-82). The District Court's findings and conclusions were based upon detailed findings of fact.

B. Opinion Of The Court Of Appeals On The First Appeal.

On the first appeal of this case, the appellate panel vacated the Judgment and remanded the case to the trial court (60-65). It did so because it could not determine whether the District Court correctly assessed the evidence within a framework of properly allocated burdens of proof.[3]

C. Actions Of The District Court After The Remand.

On remand the District Court empha-

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[3] In support of its action, the appellate panel cited this Court's opinion of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

sized that the respondents had the burden of proof at the trial, and the Petitioner never had the burden to prove any matter. The District Court then reiterated its findings of no discrimination against the claims of seven individual claimants. It found for the remainder of the plaintiffs (51-59).

D. Opinion Of The Court Of Appeals On The Second Appeal.

On the second appeal of the case, the Appellate Court affirmed the District Court in all respects except for its reversal of the individual claims of Crawford and the class issue of initial job placement (3-38).[4] In its opinion,

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[4] The opinion is reported at 726 F.2d 136 (4th Cir. 1984). It should be noted that in addition to affirming the finding of a retaliatory discharge for Williams, the appellate panel, without dissent, affirmed similar findings for Brady and Pendergrass. In each instance (Brady, Pendergrass, and Williams), the reason advances by Petitioner was found to be pretextual by the District Court.

the Appellate Court: (i) affirmed the District Court's finding of a general policy and pattern of classwide discrimination which included the practices of involuntary terminations, promotions, transfers, job assignments, and provision of forklift assistance; (ii) held that the District Court, upon remand, correctly assessed the evidence within the framework of properly allocated burdens of proof (6-8); (iii) held that the District Court applied the principles of Burdine and U. S. Postal System v. Aikens, ____ U.S.____, 103 S.Ct. 1478 (1983) in an appropriate manner (8); (iv) affirmed the District Court's findings that two other individuals were subjected to retaliatory discharges; and (v) discussed the evidence of Williams in detail (3-21, 32-38; 726 F.2d 136-146).

E. Evidence Concerning The Retaliatory Discharge Of James Williams.

Petitioner contends that the finding of the retaliatory discharge of Williams is erroneous since there was no evidence to support said finding. It erroneously limits its discussion of the relevant evidence to the testimony of Williams and the supervisor who terminated him.

The evidence shows that (i) Williams was subjected to a retaliatory discharge; (ii) during the same general time period, two other persons (Brady and Pendergrass) were also terminated by Petitioner because they filed EEOC charges; (iii) there was a pattern of discrimination in involuntary terminations, including retaliatory discharges in response to the filing of employment discrimination charges (27, 74, 76-77, 98-100, 107-108) (Appendix at pp. 8-11);

and, (iv) there was a general policy and pattern of discrimination against blacks which included the employment practices of involuntary terminations, promotions, transfers, job assignments, and provision of forklift assistance (76-77; 726 F.2d at 146). The evidence for the foregoing is described below:

(a) Brady. The District Court, affirmed by the Appellate Court, found the following facts. Brady, a warehouseman, was employed by Thurston between February, 1973 and October, 1976. When Brady asked about a January, 1976 job vacancy, he was asked by the supervisor if he could get on the "soul brothers" (black employees). Brady filed an EEOC charge. After Brady was told he had a bright future, he was asked by management personnel of Petitioner to withdraw the charge. Brady

refused to do so. After his refusal Brady was consistently given more difficult trucks to unload than he had received prior to his refusal. He was terminated by the same men who asked him to withdraw his charge. Brady never received a warning until the day he was fired. At the time he was terminated, Brady was told by the terminal manager that he (Brady) had done what he needed to do, and they (Thurston) were doing what they had to do. The District Court found Petitioner's reasons to be pretextual and that Brady had been subjected to a retaliatory discharge. (Appendix at pp. 6 to 8; 726 F.2d at 141-142).

(b) Pendergrass. The District Court, affirmed by the Appellate Court, found the following facts. Pendergrass, a forklift driver/warehouseman, was employed by Thurston between August 4,

1974 and July 23, 1978. He filed his first EEOC charge in July, 1976. His desposition was taken on February 14, 1977; the terminal manager (Boyce Hudspeth) was present. Hudspeth signed the papers dealing with Pendergrass' termination. Pendergrass did not receive any warnings. He was terminated for alleged violation of Petitioner's attendance rules. He notified the supervisor the day before he would be absent. In effect, the three absences amounted to one excused absence (prior notice to supervisor) and two days where Pendergrass was marked absent because he failed to work overtime. The absences, excused at one point, were unexcused later on. The supervisors' testimony did not contradict Pendergrass' testimony that he told them he would be out, and the absences were excused. Pendergrass was tardy (1-3 minutes)

because he was in line to punch the time clock. Whites used by Petitioner to compare Pendergrass with were not comparable. The District Court found Petitioner's reasons to be pretextual and that Pendergrass had been subjected to a retaliatory discharge. Appendix at pp. 3 to 5; 726 F.2d at 143-144.

(c) James Williams. The District Court, affirmed by the Appellate Court, found the following facts. Williams was employed by Thurston between October 1, 1968 and January 7, 1978 as a warehouseman. Prior to January 1, 1978, Williams had never received a warning. After he filed an EEOC charge, Petitioner deposed Williams on February 14, 1977. Boyce Hudspeth, the terminal manager, was present. On January 7, 1978, Williams was given a trailer to unload; it had a red

tag on it. This tag meant that the unit was defective. Williams unloaded the trailer until he got to the headload (front of the trailer). Because of instructions, he was not to remove the headload. Williams saw the supervisor (Lee Flowe) about the headload because it would have to come off (due to the red tag). Williams asked Flowe to examine the headload. The trailer was directly across from the supervisor's shack. Flowe looked at the load and gave Williams another load. Forty-five minutes later, Flowe told Williams that Hudspeth had told him to fire Williams. Flowe corroborated Williams' testimony that: Williams asked him to look at the headload; he looked at it; and, he gave Williams another load. Flowe accused Williams of removing the red tag so he could avoid unloading the headload; Williams denied this. Flowe did not see

Williams remove the tag. Many persons were in the area of the warehouse where the trailer was located. Williams was given another assignment to either load or unload a truck as normally required. The District Court, evaluating credibility including demeanor among other things (Appendix at pp. 2-3), found that Williams proved pretext and that this discharge was retaliatory. Appendix at pp. 5-6; 726 F.2d at 144.

(d) Termination System. The District Court, affirmed by the Appellate Court, found the following facts. The terminal had a written set of rules of conduct. The use of written reprimands is within the discretion of each supervisor. There is no set pattern of discipline. It varies from one supervisor to another. One supervisor used a progressive system (oral, written, termination). Other supervisors

would terminate without prior warnings. The criteria was the common sense of the supervisor. The system is unwritten (98-101).

Between January 1, 1973 and May 31, 1977, there was a total of 195 involuntary teminations (146 white; 49 black) (100-101, 118). Utilizing the "standard deviation analysis" where the sample is 195, the black percentage of the terminal work force is 17.2%, the expected number is 33.54, the actual number is 49, the difference is 15.46, and the standard deviation is 5.27, the test result is a significant 2.93.[5]

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[5] See e.g., Hazlewood School District v. United States, 430 U.S. 299, 311-312, n. 17 (1977); Castaneda v. Partida, 430 U.S. 482, 496-497, n. 17 (1977); Lilly v. Harris-Teeter, 720 F.2d 326, 335-337, and n. 18 (4th Cir. 1984), cert. den., ___U.S.___ 104 S.Ct. 2154 (1984); and, EEOC v. American National Bank, 652 F.2d 1176, 1190-1193 (4th Cir. 1981), cert. denied, ___U.S.___, 103 S.Ct. 235 (1982).

Petitioner did not offer any class evidence concerning terminations. The only evidence it offered was in response to the individual claims. The statistics associated with terminations show that blacks were terminated involuntarily at a much higher rate than whites (100, 101, 118).

SUMMARY OF ARGUMENT

The lower courts, based upon substantial evidence of discrimination, appropriately applied the well-established law of this Court in finding and affirming that respondent Williams was terminated because he filed an EEOC charge. The Petitioner's review of the evidence in its Petition is erroneously limited to the testimony of respondent Williams and his supervisor. It fails to analyze the impact of relevant evidence concerning patterns of discrimination, statistics, and other individual

instances of retaliatory termination. The Petitioner advances arguments which fly in the face of the relevant evidence and contravene the well-established law of this Court. It asserts an intercircuit conflict where none exists. Petitioner seeks to avoid the consequences of its discriminatory acts by seeking interpretations of the law which should be rejected by this Court. Petitioner fails to advance a single valid reason for the issuance of a Writ.

ARGUMENT

A. The Court Of Appeals And District Court Properly Applied Well-Established Principles Of Law To The Facts.

The Petitioner only challenges the finding that respondent Williams was subjected to a retaliatory discharge and the underlying credibility decisions of the District Court. It must be noted

that the Petitioner does not challenge (i) the finding of a pattern and practice of discrimination in terminations, including retaliatory discharges in response to the filing of employment discrimination charges* (98-88); (ii) the findings of retaliatory discharges involving Brady and Pendergrass (74; Appendix at pp. 3-6);[6] (iii) the findings of class-wide discrimination (i.e., pattern and practice of discrimination) in terminations, job assignments, provision of forklift assistance to warehousemen, transfers and promotions (27-28, 76-77); and, the credibility decisions of the District Court, affirmed by the Court of Appeals, involving the promotion claim of Jerry Hunter and the class issues of job

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[6] See also 726 F.2d at 141-144.

* A person reading the Petition and not knowing anyting else about the case would not know of this finding.

job assignments and provision of fork-lift assistance.[7]

Petitioner's first argument is that the challenged finding is not supported by any evidence (i.e., it is "clearly erroneous"). It asserts that the error is twofold: (i) first, the evidence does not support the District Court's finding that Williams did not remove the tag; and (ii) secondly, even if the District Court was correct (i.e., not clearly erroneous) in this finding, it erred when it rejected as pretextual the second advanced reason of the Petitioner that it acted in good faith when it discharged Williams because it had a

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[7] See 726 F.2d at 142, 146. Petitioner claimed it offered two promotions to Hunter. Hunter denied this. The District Court resolved the credibibility issues in favor of Hunter. In reference to the issues of job assignments and forklift assistance, there was conflicting evidence. As pointed out by the Court of Appeals, the District Court as the trier of fact, was entitled to some evidence and not believe other evidence.

reasonable belief that he removed the tag. Petition For Certiorari (hereinafter Petition at _____) at 15-23.

The evidence supports the finding of the District Court. A detailed description is set forth above at pp. 6 to 14. There is a pattern of discrimination in terminations, including retaliatory discharges. There is a general policy of discrimination (27-28, 76-77). There were two other plaintiffs who were subjected to retaliatory discharges by the petitioner during the same general time period (one 15 months before Williams; the other 6 months after Williams). When Williams reached the headload, he called the attention of his supervisor to the load. He could not move it because of prior instructions. The headload would have to be removed because of the tag. The supervisor, in response to Williams'

request, examined the headload and assigned Williams to another truck. No one saw Williams remove the tag. Forty-five minutes later the supervisor fired Williams for removing the tag.

The Petitioner's first argument should be rejected for the following reasons.

(1) As demonstrated by the preceding paragraph, and pp. 6 to 14, supra, there is substantial evidence supporting the District Court's finding and the Court of Appeal's affirmation. The Petition only examines the testimony of Williams and his supervisor. Petitioner's description and analysis of the evidence utterly fails to consider the impact of the findings of (i) a discriminatory practice of terminations, including retaliatory discharges; (ii) a general pattern and

practice of discrimination;[8] and, (iii) the retaliatory discharges of two other plaintiffs upon Williams' claim. The Petition, by limiting its evidentiary discussion to the testimony of Williams and the supervisor, isolates Williams from the remainder of the pattern and practice case and examines his claim in a vacuum. This approach ignores the principle of law that when a pattern of discrimination is proven an inference arises that any particular employment decision, while the policy was in effect, was made pursuant to said practice. This creates a presumption of entitlement to relief which the employer must overcome. See e.g., International Brotherhood of Teamsters v. United

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[8] Covering the specific practices of involuntary terminations, including retaliatory discharges; promotions; transfers; job assignments; and, provision of forklift assistance.

States, 431 U.S. 324, 362 (1977). The Petition completely ignores the statistical evidence of discrimination in terminations (described above at pp. 13-14) as well as the evidence of a general policy of discrimination. Such evidence can be used to assist in the evaluation of a plaintiff's individual claim of discrimination. See e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973).

> Other evidence that may be relevant to any showing of pretext includes . . . petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. 411 U.S. at 804-805.

The evidence shows a general policy of discrimination of which Williams' ter-

mination was but a piece. This was noted by the concurring opinion of Judge Phillips (37).

(ii) The District Court correctly applied the principles of Burdine, supra. This Court has specifically recognized that credibility resolutions play a role in determining whether a plaintiff has shown pretext:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to show that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the Court that she has been the victim of intentional discrimination. She may succeed in this either directly . . . or indirectly by showing that the employer's proffered reason is unworthy of credence. Burdine, 450 U.S. at 256. (emphasis added)

The credibility determination, subject to the provisions of the clearly erroneous rule, is the sole province of the trier of fact. As stated by the Court

of Appeals, the District Court viewed the demeanor of the witnesses and chose to believe Williams. Given the evidentiary record in this case, these credibility determinations are not clearly erroneous. The District Court, as required by Burdine, placed the burden upon the respondents. Williams met this burden.

(iii) Petitioner asserts that there was no showing of pretext. Petitioner advanced two reasons for Williams' termination: his removal of the tag, and its reasonable good faith belief that he removed the tag. Its evidentiary analysis is limited to the testimony of Williams and his supervisor. Such an approach is erroneous. As recognized by this Court in Burdine, the determination of whether pretext is present is based upon an examination of all of the evidence. 450 U.S. at 255-256, text and

f.n. 10.[9] As stated above, this Court has recognized that evidence of statistics and a general policy of discrimination is relevant to a showing of pretext. McDonnell Douglas, supra, 411 U.S. at 804-805. As discussed above, Petitioner's evidentiary discussion considered only the testimony of Williams and the supervisor. The evidence of statistics, a general policy and pattern of discrimination (including terminations), and the two other individual findings of retaliatory discharge support the District Court's finding of pretext as well as its credibility determinations concerning the conflicts

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[9] It appears from Burdine, that evidence is examined as follows: (i) for the prima facie case one only looks at the plaintiff's evidence; (ii) for the articulation of a legitimate, non-discriminatory reason, one examines the employer's evidence; and, (iii) for the determination of whether pretext is present, one examines all of the evidence.

between the testimony of Williams and his supervisor. In short, Petitioner's termination of Williams " . . . conformed to the general policy of discrimination against blacks." McDonnell Douglas, supra, 411 U.S. at 805.

(iv) Petitioner states that:

> "It could be deemed that a prima facie case for Williams was put forward . . . But after that he presented nothing at all and left the defendant's explanation, of its good faith reasons for discharging him unchallenged. At that point the case for James Williams . . . completely failed." Petition at p. 30.

after setting forth verbatim the three stage test (prima facie case, articulation of legitimate, non-discriminatory reason, and opportunity to prove that the advanced reason was pretextual) of Burdine. This approach treats the Burdine test mechanically. According to Petitioner, if no evidence is offered by the plaintiff after the defendant produ-

ces its reason, no pretext is shown. Petitioner's mechanical approach has been rejected by this Court. See e.g., Teamsters, supra, 431 U.S. at 358; and McDonnell Douglas, supra, 411 U.S. at 802, n. 13. A plaintiff may put evidence on which shows that the advanced reason is pretextual while presenting a prima facie case. The important criterion is not when the evidence is put on, but whether it is put on at all. In this case this includes evidence of statistics, a showing of a general policy of discrimination and proof of similar individual instances of retaliatory discharge. Petitioner is simply erroneous in assserting that Williams offered nothing. He did not leave the Petitioner's reasons unchallenged. It is Petitioner's myopic view of the evidence and refusal to apply the correct legal principles that leave it as the

sole believer that its reasons were unchallenged by Williams.

(v) Petitioner's "bottom line" argument is that both the Court of Appeals and District Court misapplied the principles of Burdine. This argument is without merit. The Court of Appeals remanded the District Court's initial decision because it could not determine whether the principles of Burdine had been properly used by the District Court. The District Court specifically addressed the principles of Burdine upon remand and applied them correctly (51-59). The Court of Appeals correctly reviewed the District Court's application of Burdine (3-31; 726 F.2d 136). In fact the Court of Appeals, during its second review, reversed the favorable finding of one individual because the record evidence failed to establish the prohibited

motive. 726 F.2d at 145. In short, Burdine has been correctly applied by the lower courts. The purpose of the initial remand was to make sure that Burdine was applied correctly. This has been done. Further review is neither necessary nor justified.

(vi) Petitioner asserts that there is no proof of intentional discrimination (i.e., no prohibited motivation was shown) against Williams.[10] Petition at pp. 20-23. Motive is usually a matter of inference drawn from the evidence. It can be established by differential

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[10] In the event there is any question about the Court of Appeals' awareness of the motivation question during its review of the entire case, it should be noted that the claim of one individual was reversed because the record evidence failed to establish the prohibited motive. 726 F.2d at 145. This shows that the Court of Appeals was examining the evidence of all the claims to make sure that the record supported the District Court's findings on the question of motive.

treatment alone.[11] Motive can also be established by statistics in a disparate treatment case such as this.[12] This Court has stated that the plaintiff's burden to show pretext merges with the ultimate burden of persuading the trial court that the plaintiff had been the victim of intentional discrimination. Burdine, supra, 450 U.S. at 256. There is substantial evidence of intentional discrimination against Williams. A review of all of the evidence (Williams' testimony; his supervisor's corroborative testimony;[13] the statistics showing race to be a significant factor in terminations, general policy of discrimination, and two similar individual

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[11] Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266 (1977).

[12] Teamsters, supra, 430 U.S. at 339, text and f.n. 20.

[13] See page 11, supra.

instances of retaliatory discharges during the same general time frame) supports the findings of pretext and intentional discrimination by the Petitioner.

(v) Petitioner's assertion that the finding of the retaliatory discharge of Williams is erroneous is a meritless challenge of the District Court's credibility decisions. One of the primary functions of any trier of fact is the decision of who, how much, and what to believe. Fact finding, including credibility resolutions of conflicting testimony, is the basic responsibility of the trial courts. See e.g., DeMarco v. United States, 415 U.S. 449 (1974). A trial judge is not bound to believe the testimony of the employer, even if it is uncontradicted and unimpeached.[14]

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[14] See e.g., Teamsters, supra, 431 U.S. at 342, n. 24; and Guzman v. Pichiril, 369 U.S. 698, 702-703 (1962).

Credibility involves demeanor assessments and "comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Wright and Miller, Federal Practice and Procedure: Civil § 2586, Vol. 9 at 737 (West Publishing, 1971)(emphasis added). An Appellate Court must be especially reluctant to set aside a finding based on the trial judge's assessment of conflicting oral testimony. Id.

The Court of Appeals noted that the credibility decisions of the District Court in Williams' claim were appropriate in light of (i) witness demeanor; (ii) the context of all of the evidence; and (iii) Williams' testimony being buttressed by the finding that Petitioner engaged in a general pattern of discrimination of which

Williams' termination was one piece (32-38).

As stated above, this Court's opinion in Burdine allows a plaintiff to show that the employer's advanced reason is pretextual since it is unworthy of credence. 450 U.S. at 256. Neither side had direct evidence as to the red tag incident. Williams had his denial; Petitioner had its limited circumstancial evidence. Williams had no motive to remove the tag since he was given work immediately after asking Flowe to examine the headload. He could not escape any work. Flowe's testimony corroborated Williams in that Williams asked him to look at the headload, he looked at it, and gave Williams another assignment (Appendix at pp. 5-6; see page 11, supra). This gives credence to Williams' denial that he removed the red tag. The Petitioner, on the other hand,

had every motive to terminate him for his EEOC complaints. This conduct of Petitioner was consistent with its retaliatory discharges of two other plaintiffs and its general policy of discrimination (i.e., Petitioner's conduct "conformed to its general pattern of discrimination against blacks." McDonnell Douglas, supra, 411 U.S. at 805). The resolution of this conflict was well within the discretion of the District Court. The District Court had to resolve the conflict. The resolution had to be within the framework of all of the evidence since the determination of whether pretext is present is based upon an examination of all of the evidence. In light of the evidence, Petitioner's reasons were found unworthy of credence and, therefore, pretextual. The Petitioner's dual reasons of Williams' alleged removal of the tag and

its good faith belief that he removed the tag were appropriately rejected in light of all of the evidence that (i) Williams was more credible; (ii) Petitioner fired two other blacks for filing EEOC charges; (iii) Petitioner had engaged in a discriminatory pattern of terminations, including retaliatory discharges; and, (iv) Petitioner had engaged in a general pattern of discrimination. Petitioner's "good faith" in its employment decision could be and was appropriately not given credence by the District Court.

B. There Is No Intercircuit Conflict.

Petitioner argues that the Court of Appeals' decision conflicts with the First Circuit decision of Loeb v. Textron, 600 F.2d 1003, 1012, f.n. 6, 1014, 1015 (1st Cir. 1979) and the Eleventh Circuit decision of Moore v.

Sears, Roebuck and Company, 683 F.2d 1321, 1323 (11th Cir. 1981).[15] The Moore and Loeb courts stated that an employer's good faith belief that the plaintiff did something wrong (e.g., poor job performance) is sufficient reason for discharge (i.e., such a good faith belief is a legitimate, non-discriminatory reason) as long as the belief is not pretextual. These courts placed emphasis on the "good faith" belief as opposed to whether the employer's belief was correct. They stated that the employer was not required to prove that its belief was

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[15] Both of these cases are age discrimination cases which were tried by juries. The plaintiff lost in Moore. The plaintiff won in Loeb. The Loeb Court reversed the District Court because it had instructed the jury that the employer had to prove by the preponderance of the evidence that its actions were motivated by reasons other than age and were for good cause.

correct. The employer only had to show that its belief was in good faith.

These decisions do not conflict with the decision of the Court of Appeals in this case. The Court of Appeals did not say that an employer's good faith belief could not articulate a legitimate, non-discriminatory reason. It did not say that the employer must show that the stated reason was correct. It merely said, just as the Moore court did (683 F.2d at 1323, n. 4), that the "good faith belief" reason will not carry the day if it is shown to be pretextual. The only conflict is in the imagination of the Petitioner. The Petitioner seems to be asserting that "a good faith belief" defense is beyond the reach of pretext. Of course, such a

reason (like any other "legitimate, non-discriminatory" reason), if proven to be pretextual by a plaintiff, will fail. In the case at hand the Petitioner's "good faith belief" was appropriately found to be pretextual.

CONCLUSION

For the reasons given above, the Petitioner's request for a Writ should be denied. The actions of the District Court were entirely appropriate given the evidence in this case and the decisions of this Court. The case was reviewed by the Court of Appeals in an appropriate manner. It reversed the District Court when required to do so. The Petitioner has failed to give a single valid reason for the issuance of a Writ.

Respectfully submitted this the 18 day of June, 1984.

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. C-C-76-343

RANDY BRADY, JAMES WILLIAMS, MICHAEL FOX, JERRY HUNTER, FRANCIS PENDERGRASS, LACY MONDS, and CHRIS WATKINS, individually and on behalf of all others similarly situated,

Plaintiffs,

and

CURTIS CRAWFORD and LORENZO MOSELY,

Plaintiffs-Intervenors,

vs.

THURSTON MOTOR LINES, a corporation,

Defendant. /

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Michael A. Sheely, Sheely and Brooks, 418 Law Building, Charlotte, North Carolina 28202, and Shelley Blum, Raleigh, North Carolina, for plaintiffs.

William T. Cranfill, Jr. and J. W. Alexander, Blakeney Alexander & Machen, 3450 NCNB Plaza, Charlotte, North Caro-

lina 28280, for defendants.

Before James B. McMillan, District Judge, Western District of North Carolina,, Charlotte Division.

Tried: March 5-9, 1979, March 26, 27, 1979; Non-jury.

Decided: July 16,1979, by Memorandum of Decision on File.

This is an action brought pursuant to 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. The complaint was filed on December 10, 1976. The complaint, subsequent to motions by the plaintiffs and order of this Court, was amended on July 18, 1978, to allow the intervention of Curtiss (sic) Crawford and Lorenzo Mosely. Plaintiffs seek injunctive relief to remedy alleged unlawful employment practices and to provide specific relief for each individual who has suffered from these practices. Based on the evidence and the exhibits, and after

hearing and credibility of witnesses (and believability of their testimony), viewing the demeanor of witnesses, considering the interests of the witnesses and considering the arguments of counsel, the Court, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, makes the following:

FINDINGS OF FACT

Paragraphs 1-8 of these Findings have been deleted since they have no bearing on this appeal.

9. Plaintiff Francis Pendergrass was employed as a warehouseman at the Charlotte terminal in August, 1974. . . . (portion deleted because it has no bearing on this appeal). Defendant's discipline practices are subjective and vary greatly from supervisor to supervisor. . . . (portion deleted because of no bearing on this appeal). Pendergrass

filed his initial Equal Employment Opportunity Commission charge against defendant in late 1976.[5] Management of the Company knew of said charge since members of management were present at Pendergrass' deposition on February 14, 1977. In June, 1978, he was discharged on the grounds of excessive tardiness and three unexecused absences. Pendergrass received no warning about the sanction that might be imposed for tardiness during the period immediately preceding his discharge; his unexcused absences in fact amounted to one excused absence (prior verbal notice to his supervisor) and two days in which Pendergrass was marked absent because he failed to work overtime. Pendergrass is not entitled to recover on his claim of discriminatory discipline, but he is entitled to appropriate relief in second stage proceedings on his claim of

unlawful (retaliatory) discharge.

Paragraph 10 of the Findings deleted because it has no bearing on this appeal.

11. Plaintiff James Williams was employed by defendant from October, 1968 until his discharge in January, 1978. . . . (portion deleted because it has no bearing on this appeal). In January, 1978 Williams was discharged, reportedly for removing a red tag from a trailer used by defendant to signify the need for trailer repair. No one saw Williams remove the tag. Williams testified that he told his supervisor about the tag and was given another load to work on while the supervisor decided whether to have the tagged trailer completely unloaded. The supervisor testified that he was not reminded of the red tag earlier in the shift. Defendant suggested that Williams removed the tag to avoid un-

loading freight that was hard to maneuver; it is undisputed that Williams was immediately assigned another load of freight after he finished with the tagged trailer. Williams filed a charge with the Equal Employment Opportunity Commission on July 28, 1976, and a second charge in October, 1976,[6] and Mangement of the Company knew of said charge since some of its members were present at Williams' deposition on February 14, 1977 and September 7, 1977. He received a "right to sue" letter in February, 1977. Williams is entitled to appropriate relief on his claim of being subjected to an unlawful (retaliatory) discharge.

12. Plaintiff Randy Brady was employed in the terminal facility from February, 1973 until his discharge in October, 1976. . . . (portion of findng dealing with promotion/transfer claims

deleted since not relevant to appeal). In January, 1976 Brady expressed an interest in another line foreman position that became available. In response to the inquiry, his supervisor asked him if he "could get on the soul brothers." The position was filled by a white employee, Leonard Knox, who had less warehouse experience than Brady. In February, 1976 Brady filed a charge against defendant with the Equal Employment Opportunity Commission.[7] In April, 1976 Brady was called to a meeting with management personnel and was asked to withdraw the EEOC charges. After the meeting, he was given the hardest dock assignments consistently. In October, 1976 Brady was terminated, reportedly for "poor attendance." The terminal manager at the time told Brady he was doing what he had to do, just as Brady had done what he had to do.

. . . (portion deleted since it has no bearing on the appeal). Brady is entitled to appropriate individual relief for unlawful discrimination in the denial of the January, 1976 promotion to line foreman and for discriminatory (retaliatory) discharge.

Paragraphs 13-35 of the Findings have been deleted since they have no bearing on this appeal.

36. Plaintiffs have established a prima facie case of discrimination in connection with terminations (actual and constructive), specifically including retaliatory discharge in response to the filing of employment discrimination charges with the Equal Employment Opportunity Commission. The Company did not rebut this case. This is established by the individual cases of Messrs. Pendergrass, Williams, Crawford, and Brady, as well as statistical[36] and

other evidence. Plaintiffs' Trial Exhibit 34 offers numerous examples of whites receiving warnings for absenteeism prior to their termination, while Pendergrass did not receive any such warnings. The testimony of William Hunt shows that he utilized a progressive system of discipline. The testimony of Messrs. Thurston and Cotzine indicated that the system was within the discretion of the supervisor, utilized "common sense" as a guideline, and was not reduced to written form. The system utilized by the terminal was essentially a group of subsystems, each one dependent upon the supervisor utilizing it. Such a system can range from the progressive system of Hunt to the whims of another supervisor. "Common sense" as the only guide can lead to, and in this case, did lead to, uneven application of discipline, including discharge.

The statistics bear this out in that a greater proportion of the black work force was subjected to involuntary terminations.

% OF WORK FORCE INVOLUNTARILY TERMINATED

YEAR	% B	% W
1973	6.9	3.3
1974	14.5	6.0
1975	12.6	12.9
1976	22.8	13.9

(Plaintiff's Trial Exhibit 5)

and black involuntary terminations were a much higher percentage of all black terminations than the corresponding percentage for whites:

% OF TERMINATIONS WHICH WERE INVOLUNTARY

YEAR	% B	% W
1973	15.8	9.6
1974	43.5	26.0
1975	57.9	50.0
1976	66.7	39.1
1977	50.0	17.6

(Plaintiffs' Trial Exhibit 5)

A system without written guidelines, and which depends upon a subjective "common sense" as the controlling factor, is discriminatory when it results in the pattern shown by the statistics.

The remaining Findings and footnotes 1-35 have been deleted since they have no bearing on this appeal.